

GENERAL INDEX, TITLE, &c.,

TO THE

INDIAN LAW REPORTS, CALCUTTA SERIES.

VOL. XXXV.

JANUARY TO DECEMBER 1908.

Published under the Authority of the Governor-General in Council,

BY THE BOOK DEPÔT BRANCH OF THE LEGISLATIVE DEPART-MENT OF THE BENGAL SECRETARIAT,

WRITERS' BUILDINGS, CALCUTTA.

PRINTED AT THE BENGAL SECRETARIAT PRESS.



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1908
SETH MANNA LALL PARRUCK v. GAINSFORD.
HARINGTON J.

attachment was made. It is stated at the Bar that a search was made, but by some accident the existence of the notification was not discovered, the consequence was that it was not brought to the notice of the Court and I have very little doubt that, if it had been brought to the notice of the Court, the order for attachment would never have been made.

As it is my view that the Statutes, to which I have referred, affect the fund in question, it becomes unnecessary to discuss the questions raised by Mr Mitter as to the construction of the rules. The application for an order directing that the sum is not liable to be attached must be allowed with costs.

Application allowed.

Attorney for the applicants: *M. L. Sen.*
Attorney for the opposite party: *B. S. Ghosh.*

J. C.

PRIVY COUNCIL.

HANSRAJ (1)

v.

SUNDAR LAL

AND

HANSRAJ (2)

v.

DWARKA DAS.

(1) [On appeal from the Chief Court of the Punjab.]
(2) [On appeal from the Court of the Agent to the Governor-General in Central India.]

Appeal—Arbitration—Arbitrator—Privy Council—Decree in accordance with award—Civil Procedure Code (Act XIV of 1882) ss. 2, 622—Power of arbitrator—Question of law—Revision—Misconduct of arbitrator alleged—Court of Agent to Governor-General for Central India.

The parties to two suits for partition were the members of a joint Hindu family, who owned property moveable and immoveable and carried on a banking and mercantile business in the Punjab and in the native State of Bhopal.

One suit was brought in 1886 by one of the members of the family in the Court of the Political Agent in Bhopal for partition of the property within the jurisdiction of that Court: and the other was instituted in 1888 by another member of the family in the Court of the District Judge of Delhi for partition of all the property both within and outside British India.

By agreement of parties "all matters in dispute" were eventually referred to an arbitrator, who was to determine "what joint property moveable and immoveable (except the immoveable property outside British India) was to be partitioned between the parties." One of the matters in dispute was the jurisdiction of the Punjab Court as to the moveable property outside British India).

The arbitrator finally submitted his award on 29th June, 1900 Objections to it by the defendants, mostly on the ground of misconduct of the arbitrator, were overruled, and the District Judge of Delhi made a decree in accordance with the award. An appeal and in the alternative a petition for revision under section 622 of the Civil Procedure Code was preferred by the defendants to the Chief Court, who held that the arbitrator must be taken to have decided the question of jurisdiction, and affirmed the decree as not being assailable either

* *Present:*—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.

Worley (1), *Robson* v. *Whittingham* (2) and *Ghanasham Nilkant Nadkabni* v. *Maroba Ramchandra Pai* (3). On the question of the nature of light to which the plaintiff is entitled, see *Scott* v. *Pape* (4).

[*Mr. Knight* referred to *Straight* v. *Burn* (5).]

In *King* v. *Jolly* (6), there is authority that, although there may be material diminution of light, if sufficient be left for ordinary purposes, no action will lie; on the facts of that case damages were decreed, and a mandatory injunction was refused. [FLETCHER J. referred to *Dent* v. *Auction Mart Co.*(7). You were content to continue building at your own risk Can you now seriously resist a mandatory injunction in respect of the portion built after September 27th, 1907 ?]

Yes. Having built so substantial a portion by the 27th September it would be inequitable to expect us to desist from completing. See *Aynsley* v. *Glover* (8). See also *City of London Brewery Co.* v. *Tennant* (9).

The plaintiff is estopped by his acquiescence from now claiming a mandatory injunction. As early as January 1907 he knew substantially what sort of building was going to be erected: in May 1907 the plans were actually shown to his agents and he took no steps till September 27th, 1907. Such delay amounts to want of *bonâ fides*. See *Senior* v. *Pawson* (10), where also the defendant continued building at his own risk. See also *Ghanasham Nilkant Nadkabni* v. *Morola Ramchandra Pai* (3).

Mr. Knight (*Mr. H. D. Bose* and *Mr C. C. Ghose* with him), for the plaintiff, was not called upon on the first issue. On the second issue: Sections 54 and 55 of the Specific Relief Act express in general terms the rules acted upon by Courts of Equity in England. See *The Shamnugger Jute Factory Co.* v. *Ram Narain Chatterjee* (11), and *The Land Mortgage Bank of India* v. *Ahmedbhoy and Kesowram Ramanand*(12). Acquiescence to have any legal

(1) (1884) L. R. 26 Ch. D. 578.
(2) (1866) L. R. 1 Ch. Ap. 442
(3) (1894) I. L. R. 18 Bom. 474.
(4) (1886) L. R. 31 Ch. D. 554.
(5) (1869) L. R. 5 Ch. Ap. 163
(6) [1905] 1 Ch. 480.
[1907] A. C. 1.
(7) (1866) L. R. 2 Eq. 238.
(8) (1874) L. R. 18 Eq. 544, 553.
(9) (1873) L. R. 9 Ch. Ap. 212.
(10) (1866) L. R. 3 Eq. 330.
(11) (1886) I. L. R. 14 Calc. 189, 192.
(12) (1883) I. L. R. 8 Bom. 35, 67.

1906

Anath Nath Deb v. Gallstaun.

consequences must amount to equitable estoppel. The prin is quite clear: the party complaining (i.e. the defendant) have proceeded on the erroneous belief of his own legal ri and must have changed his position on the faith of such be and the plaintiff must be proved guilty of fraud. See *Du Spurrier*(1), *Ramsden* v. *Dyson* (2), *Willmott* v. *Barber* (3), *P* v. *Bennis* (4) and *The Rochdale Canal Company* v. *King* (5). the present suit it is obvious the defendant has been und mistake as to his legal rights. He knew all along tha was committing an infringement and trusted that once building was erected, he would be only ordered to give com sation. Apart from acquiescence, the mere fact of delay is n to the claim. See *Kissen Gopal Sadaney* v. *Kally Prosonno S* The owner of an ancient light is entitled to a mand injunction, where the obstruction renders his house substan less fit for occupation. See *Kelk* v. *Pearson* (7), and *Cou Laidler* (8).

Mr. B. C. Mitter, in reply. The cases cited on behalf o plaintiff on the question of acquiescence have no applicati the present action. Here we do not plead acquiescence as to the suit, but as a bar to one specific remedy, viz., a mand injunction. See *Sayers* v. *Cooper* (9), *Allen* v. *Seckham* (10), *Stanley of Alderley* v. *Earl of Shrewsbury* (11), *Benode Coo Dossee* v. *Soudaminey Dossee* (12).

Cur. adv. v

Fletcher, J. This is a suit brought by the plaint restrain the defendant interfering with his ancient lights.

The plaintiff is the owner of premises known as No. 1 China Bazar Street in the Town of Calcutta, the main bu whereof consists of a two-storied house. The openings north main wall of the plaintiff's building form the subject

(1) (1802) 7 Ves. 231.
(2) (1865) L. R. 1. H. L. 129.
(3) (1880) L. R. 15 Ch. D. 96.
(4) (1887) L. R. 36 Ch. D. 740.
(5) (1851) 2 Sim. N. S. 78.
(6) (1905) I. L. R. 33 Calc. 633.
(7) (1871) L. R. 6 Ch. App. 809.
(8) [1903] 2 Ch. 337.
(9) (1884) L. R. 27 Ch. D. 103.
(10) (1879) L. R. 11 Ch. D. 790.
(11) (1875) L. R. 19 Eq. 616.
(12) (1889) I. L. R. 16 Calc. 252.

important element (Vrihaspati XXV, 72-77). "The agreement "the wealth, which is thine, is mine, that which is mine, is thine" is also another element (Dayakarma Sangraha, Chapter V, section 1, paras. 2 and 3). The criterion is not expressly spiritual benefit.

We must next see what in such a case as the present, the older authorities have laid down and whether they have been expressly dissented from by Jimutavahana. An express dissent by the authorities of the Bengal school of law will preclude our adopting the rules laid down by the older and the more orthodox authorities. The sages, whose texts have been interpreted in the *Mitakshara, were undoubtedly of opinion that a co-parcener, who* is joint, is entitled to preference under the law of survivorship. If, as has been found in this case, Lal Mohan was joint with Nanda Gopal, he would succeed according to the Mitakshara, which in my opinion, should be the guiding principle in the absence of any express texts or commentaries of the Dayabhaga school of law. I would, in all cases of absence of texts or precedents under the Dayabhaga law, have recourse to the theory of propinquity and natural love and affection, as adopted by *Vijnaneswara* and the commentators of the more ancient and orthodox schools of Hindu law. They are highly respected by lawyers of the Bengal school, and I would make the law of Bengal correspond with the law as administered in the rest of India.

On the ground also of implied agreement and convenience Nanda Gopal should exclude Hari. A and B, uncle and nephew, remained joint and acquired property jointly assisting each other. The one loves the other and each relies on the help of the other. They are in the nature of joint owners—joint tenants. The admission of a third person like Hari to succeed to the share of one of these on his death is a clear infringement of the natural order of things and the principles that regulate descent of property in all civilized systems of jurisprudence.

I am, therefore, of opinion that, in this case, the decision of the lower appellate Court is correct and that Hari was not entitled to a $\frac{1}{4}$th share of the inheritance left by Kashi Nath as a co-heir with Nanda Gopal.

The appeal, therefore, fails and is dismissed with costs.

S. M. *Appeal dismissed.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Fletcher.

1908
Jan. 8.

INDIA PUBLISHERS, LIMITED
v.
ALDRIDGE.*

Libel, suit for—Misjoinder of causes of action—Misjoinder of parties—Election—Limitation—"Cause of a like nature"—Limitation Act (XV of 1877), s. 14.

Six persons, on the 26th January 1906, instituted a suit jointly against an editor and proprietor of a newspaper for libels published on the 17th and 20th July 1905 and claimed an aggregate sum as damages.

The suit was, on the 22nd April 1907, held to be bad for misjoinder of parties and causes of action, but the Court gave the plaintiffs leave to elect, which of their number should continue the suit, and the other co-plaintiffs' names were struck out.

Subsequently, on the 1st May 1907, one of the former plaintiffs filed a suit for libel and damages, and it was contended that his suit was barred by limitation.

Held, that section 14 of the Limitation Act was not intended to apply to a case, in which a first suit failed entirely through the negligence and laches of the plaintiff himself, and that an improper joinder of parties or of causes of action would not be "a cause of like nature" within the meaning of section 14 of the Limitation Act, and therefore the plaintiff's suit was barred by limitation.

Chunder Madhub Chuckerbutty v. *Bissessuree Debea*(1), *Deo Prosad Sing* v. *Pertab Kairee*(2), *Mullick Kefait Hossein* v *Sheo Pershad Singh*(3), *Assan* v. *Pathumma*(4), *Bai Jamna* v. *Bai Ichha*(5), *Mathura Singh* v. *Bhawani Singh*(6), referred to.

APPEAL by the defendant, Albert Stuart Barrow and the India Publishers, Limited, from the judgment of CHITTY J.

This was a suit instituted by a police officer named Aldridge against the India Publishers, Ld., for printing and publishing certain articles in its paper charging him and five other police officers with matters grossly defamatory. Originally the plaintiff

* Appeal from Original Civil No 40 of 1907 in Suit No. 317 of 1907.

(1) (1866) 6 W. R. C. R. 184.
(2) (1883) I. L. R. 10 Calc. 86.
(3) (1896) I. L. R. 23 Calc. 821.
(4) (1899) I. L. R. 22 Mad. 494.
(5) (1886) I. L. R. 10 Bom. 604.
(6) (1900) I. L. R. 22 All. 248.

APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Bell.

BRINDABAN BEHARI LAL
v.
BHAWANI SAHAI.*

1908
May 22.

Grant—Regulation XIX of 1793—Act XI of 1859—Sale—Encumbrance—Liability to pay rent.

Some years before the acquisition of the Dewani by the East India Company, the Zemindar made a rent-free grant of village P. to one D. Since then D. and after him his heirs continued in possession of the village, until the institution of this suit. After the acquisition, the Company made an assessment of the lands in the Bengal Province, and village P. was then and again at the time of the Permanent Settlement, assessed at *sicca* Rs. 80, which assessment was accepted by the zemindar, and he and his heirs continued to pay the assessed amount.

In the year 1900 the zemindar made default in payment of the revenue for the September *kist*, and the village was sold under the provisions of Act XI of 1859.

The purchaser instituted a suit for recovery of possession or for assessment of rent and mesne profits

Held, that the right created under the grant was an encumbrance, which existed from before the time of the Permanent Settlement; but the plaintiff could not be affected by the laches of the defaulter or his predecessors, he was entitled to hold the estate in the same condition as it was at the time of the Permanent Settlement, when the revenue was assessed at *Sicca* Rs. 80 and to recover that amount with cesses from the defendants.

Held further, that s. 37 of Act XI of 1859 does not avoid encumbrances of every kind nor does it allow the purchaser to assess rent at a rate higher than that paid before the Permanent Settlement; the rent is not enhancible according to the law now in force, as the land must be considered to be comprised in a tenure existing from before the time of the Permanent Settlement.

Hurryhur Mookhopadhya v. *Madhub Chunder Baboo* (1) referred to.

APPEAL by the plaintiff.

About 17 years previous to the grant of the Dewani of Bengal and Bihar to the East India Company in August 1765, one Karta Narain Singh, a zemindar under the Mahomedan

* Appeal from Original Decree No. 27 of 1906 against the decree of Sarda Pershad Basu, Subordinate Judge of Chapra, dated the 20th September 1905.

(1) (1873) 14 Moo. I. A. 152.

APPEAL FROM ORIGINAL CIVIL.

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APPEAL by the defendant, Albert Stuart Barrow and the India Publishers, Limited, from the judgment of CHITTY J.

This was a suit instituted by a police officer named Aldridge against the India Publishers, Ld., for printing and publishing certain articles in its paper charging him and five other police officers with matters grossly defamatory. Originally the plaintiff

* Appeal from Original Civil No 49 of 1907 in Suit No. 317 of 1907.

(1) (1866) 6 W. R. C. R. 184.
(2) (1883) I. L. R. 10 Calc. 86.
(3) (1896) I. L. R. 23 Calc. 821.
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Held further, that s. 37 of Act XI of 1859 does not avoid encumbrances of every kind nor does it allow the purchaser to assess rent at a rate higher than that paid before the Permanent Settlement, the rent is not enhanceable according to the law now in force, as the land must be considered to be comprised in a tenure existing from before the time of the Permanent Settlement.

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(1) (1872) 14 Moo. I. A. 152.

1903

BRINDABAN BEHARI LAL v. BHAWANI SAHAI.

Government, made a rent-free grant of the village Paterha in *mahal* Khaja Sarai in the District of Saran to one Dhansiram. Since then and up to the present time Dhansiram and his successors in title continued to be in possession of the village without paying any rent to the owner or any revenue to the Government. After the acquisition of the Dewani by the East India Company, attempts were made to re-assess all the lands in the Bengal Provinces, and in 1773 a settlement for 30 years of the villages, including the village Paterha held by Karta Narain Singh, was made, and the said village was assessed at *sicca* Rupees 80. The said assessment was accepted by the zemindar, who was an heir of Karta Narain, the Collector recognizing him as being in possession, though as a matter of fact the heirs of Dhansiram, the grantee, were in possession; the zemindar took upon himself the liability to pay the revenue assessed on the village Paterha and continued to pay the same. At the Decennial Settlement of 1790, the amount of assessment was not varied; the revenue authorities accepted *sicca* Rupees 80 as the revenue payable in respect of this village by the zemindar, but they did not come to know that it was in the possession of the predecessors of the present defendants under a rent free grant. The Permanent Settlement in 1793 was made with the zemindar, who succeeded Karta Narain. He, as proprietor, instituted a suit for recovery of possession of Paterha against the predecessors-in-title of the defendants; the said suit was dismissed by the first Court on the 26th May 1796, and the decree dismissing the suit was on the 9th of July 1798 confirmed on appeal. After Regulation II of 1819 came into operation, an attempt was made to resume Paterha, as if it was held under a *lakheraj* grant; but the resumption proceedings failed and the revenue authorities declared on the 16th of February 1838 that Paterha was incapable of resumption. In the year 1843, another attempt was made by the proprietor to recover from the then holders of Paterha, the Government revenue payable in respect thereof, but the suit was dismissed on the 29th of November 1843. Since then and up to the year 1900 the predecessor-in-title of the defendants continued to be in possession without paying any rent or revenue and without being molested in any way.

ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

KADER KHAN

v.

JUGGESWAR PRASAD SINGH.*

1908
June 16.

Civil Procedure Code (Act XIV of 1882) ss. 108, 157—Suit part-heard—Adjourned hearing—Withdrawal of defendant's Counsel—Decree—Remedy.

At an adjourned hearing of a part-heard suit, the plaintiff having closed his case, and the case of the defendant having been partially entered into, Counsel for the defendant applied for a further adjournment, which was refused, and thereupon he withdrew from the case.

In his absence, the Court passed judgment on the merits of the case.

An application to have the decree set aside as an *ex-parte* decree was dismissed on the ground that under the circumstances of the case an application under s. 108 combined with s. 157 of the Civil Procedure Code could not lie.

THIS was an application for an order to set aside a decree alleged in the petition to be an *ex-parte* decree, passed on May 1st, 1908.

The suit was instituted on April 30th, 1907, for the recovery from the defendant of the sum of Rs. 17,000 being the price of fourteen Australian horses including charges for stabling and breaking-in.

The defendant filed his written statement on July 25th, 1907. On November 20th, 1907, he applied for the issue of a commission for the examination of ten witnesses on his behalf, including himself and one Mukhy Singh: this application, so far as it related to himself and Mukhy Singh, was rejected.

The suit came on for hearing on April 24th, 1908, and the defendant was represented by Counsel and contested the suit. The plaintiff's case continued on April 27th, 28th, and 29th, on which day it closed, and the defendant entered on his defence. Evidence of several witnesses taken on commission was read on behalf of the defendant, two witnesses were examined and documentary evidence tendered. It was understood that two

* Original Civil Suit No. 314 of 1907.

1908

KADIR KHAN v. JOGESWAR PRASAD SINGH.

other witnesses were going to be called, namely the defendant himself and Mukhy Singh. On April 30th, as these two witnesses had not arrived in Court, defendant's Counsel applied for an adjournment, which was granted till the following day. On May 1st, Counsel for the defendant applied for a further adjournment, which was refused as sufficient grounds were not made out. Thereupon Counsel for the defendant expressed his desire to withdraw from the suit, and did so. Upon that, Counsel for the plaintiff addressed the Court on the whole evidence, and the Court decided the case upon its merits.

It was this decree, which the defendant now submitted was an *ex-parte* one, and applied to have set aside.

Mr. Chakravarti (*Mr. Lahiri* with him) for the defendant. Although the defendant appeared through Counsel at the earlier stages of the case, on May 1st, which was the day fixed for an adjourned hearing, there was merely an application by Counsel for a further adjournment, which was refused, and thereupon Counsel withdrew from the suit. Such an application was not an "appearance." See *Satish Chandra Mukerjee* v. *Ahara Prosad Mukerjee* (1). An appeal from a decree passed in the circumstances of this case would not be the proper remedy, as an appeal implies an error in the Court of first instance, and no such error can be said to have been committed here. Section 108 of the Code applies to every case, in which a decree is passed *ex-parte* against a defendant under section 157, by reason of his non-appearance at an adjourned hearing. See *Jonardan Dobey* v. *Ramdhone Singh* (2). The two elements contemplated by section 157 are (*i*) that the original suit be pending, and (*ii*) that one or other of the parties do not appear. From the moment of withdrawal of Counsel from the suit on May 1st there was no appearance on behalf of the defendant and section 157 became applicable. See *Mariannissa* v. *Ramkalpa Gorain* (3) and *Cooke* v. *Equitable Coal Co. Ld* (4). Where a suit is part-heard and is adjourned and a party does not appear at the adjourned date of hearing, the proper procedure

(1) (1907) I. L. R. 34 Calc. 403.
(2) (1896) I. L. R. 23 Calc. 738.
(3) (1904) 8 C. W. N. 621.
(4) (1907) I. L. R. 34 Calc. 235.



THE INDIAN LAW REPORTS,

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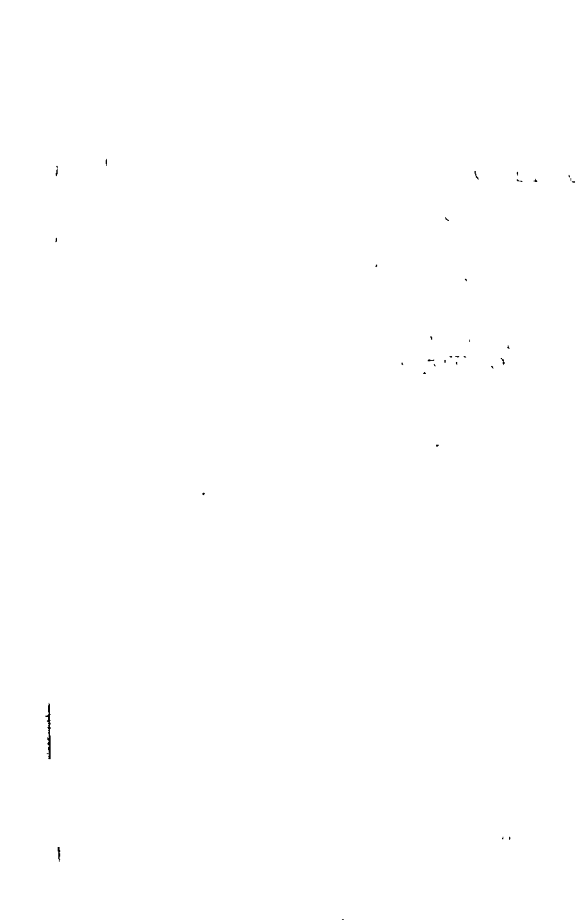
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JUDGES OF THE HIGH COURT.

1908.

Chief Justice:

THE HON'BLE SIR FRANCIS W. MACLEAN, KT., K.C.I.E.
" MR. R. F. RAMPINI (*Acting Chief Justice*).

Puisne Judges:

THE HON'BLE MR. R. F. RAMPINI (*Retired on 8th November 1908*).
" " R. HARINGTON.
" " C. M. W. BRETT, C.S.I.
" " H. L. STEPHEN.
" " S. C. MITRA (*Retired on the 18th December 1908*).
" " B. G. GEIDT (*Retired on the 15th April 1908*).
" " J. G. WOODROFFE (*On leave*).
" " A. T. MOOKERJEE (*On deputation*).
" " C. P. CASPERSZ.
" " H. HOLMWOOD.
" " C. W. CHITTY.
" " E. E. FLETCHER.
" S. SHARFUDDIN.
" H. R. H. COXE.
" L. M. DOSS (*Offg.*).
" A. E. RIVES (*Offg.*).
" H. W. C. CARNDUFF (*Offg.*).

THE HON'BLE MR. P. O'KINEALY, *Advocate-General (Retired on 30th April, 1908).*
" S. P. SINHA, *Advocate-General, from 1st May 1908.*

MR. W. G. GREGORY, *Standing Counsel.*

ERRATA.

Page 11, line 11, *for* "ands" *read* "lands".

Page 16, line 17, *omit* "of" *after* "transfer."

Page 21, line 28, *for* "that" *read* "there".

Page 82, line 8, *after* "Rent" in Head-note italics *insert* "Income Tax".

Page 118, line 25, *for* "to each" *read* "of each".

Page 408, line 36, *for* "reserving" *read* "reversing".

Page 409, line 4, *for* "Mahommedan" *read* "Mahomedan".

Page 421, line 7, of head-note *for* "alienation" *read* "alienations".

Page 424, line 7, *for* "these" *read* "those".

Page 424, line 12, *for* "48" *read* "XLVIII".

Page 522, line 25, *for* "Pasban" *read* "Sasmal".

Page 777, line 7, *for* "Tippera-Raj *read* "Tipperah-Raj".

Page 777, line 11, *for* ' preperty" *read* "property".

Page 805, line 23, *for* "provisions" *read* "provision".

Page 957, *for* "Sargent" *read* "Sargant".

Page 957, line 34 *for* "Goode" *read* "Gooch".

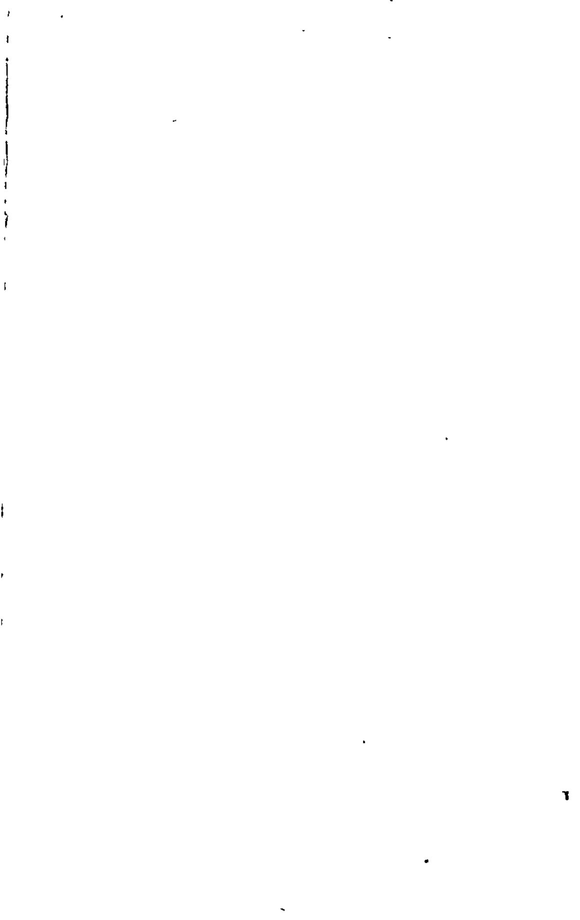


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GENERAL INDEX.

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———*Arbitration—Arbitrator—Privy Council—Decree in accordance with award—Civil Procedure Code (Act XIV of 1882), ss. 2, 622—Power of arbitrator—Question of law—Revision—Misconduct of arbitrator alleged—Court of Agent to Governor General for Central India.* The parties to two suits for partition were the members of a joint Hindu family, who owned

Appeal—*contd.*

property moveable and immoveable and carried on a banking and mercantile business in the Punjab and in the Native State of Bhopal. One suit was brought in 1886 by one of the members of the family in the Court of the Political Agent in Bhopal for partition of the property within the jurisdiction of that Court: and the other was instituted in 1888 by another member of the family in the Court of the District Judge of Delhi for partition of all the property both within and outside British India. By agreement of parties "all matters in dispute" were eventually referred to an arbitrator ... outside British India) was to be partitioned between the parties," one of the matters in dispute was the jurisdiction of the Punjab Court as to the moveable property outside British India. The arbitrator finally submitted his award on 28th June 1902. Objections to it by the defendants, mostly on the ground of misconduct of the arbitrator, were overruled, and the District Judge of Delhi made a decree in accordance with the award for appeal and in the alternative a petition for revision under section 622 of the Civil Procedure Code was preferred by the defendants to the Chief Court, who held that the arbitrator must be taken to have decided the question of jurisdiction, and affirmed the decree as not being assailable either by appeal or revision, the case being governed by *Ghulam Khan* v *Muhammad Hassan*, I L R. 29 Calc. 167; L. R. 29 I. A. 51. Similar proceedings were taken in the Sehore Court (where the suit was adjourned pending the decision by the Punjab Court) resulting in the decree in accordance with the award made by the Political Agent in Bhopal being upheld on appeal

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Grant—*concld.*

Commanding Officer as possibly affecting the convenient occupation of the Cantonment. The effect of the two documents was to show a good title in the founders and not in the Parsi Community. That view was confirmed by the fact that the founders admittedly enclosed the land and erected a Tower of Silence on it at *their own expense*; that they erected a Fire Temple in connexion with it on land acquired by private purchase, and that the evidence showed that the possession, management and control of the Tower of Silence and of the land, on which it stood, were in the founders, who for many years afterwards bore the whole expenses of the establishment and all costs of maintenance and repair; and that in the early years after the acquisition of the land and erection of the Tower (the events of which were more important than those in later years when the circumstances of the parties had somewhat changed) the priests referred such difficulties and questions as arose for the orders of the founders and obeyed those orders. PISTONJI JIVANJI *v.* SHAPURJI EDULJI CHINOY (1908), I. L. R. 35 Calc. .. 478

Grant, construction of—*Inheritance—Whether the words of inheritance contained in the grant created an absolute estate in favour of the grantee—Re-entry, right of—Breach of restriction against voluntary alienation, effect of.* A by a deed granted a *miras taluq* to his daughter *B* The demise was to her for life, on her death to her son, if she adopted one, for life, on his death "to his sons, grandsons, etc", by right of inheritance in the male line; without any power of disposing of the property at will, by gift, sale, etc. If the grantee did not adopt a son, or if she adopted, and the son died without a son, grandson, etc., the property was to revert to the grantor or to his representative. It was also provided that

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Grant, construction of—*concld.*

"the said property cannot be attached or sold for any debt incurred by you or your adopted son or grandson, etc. If it be attached or sold, the grant will at once become null and void, and the property will come into *khas* possession of me or my representatives." *B* [illegible]

[illegible] or's son against *B* and *C* for recovery of possession of the land, on the ground that the conveyance operated as a forfeiture:—*Held*, that, although the alienation by *B* to *C* being directly contrary to the provisions of the grant, was bad in law, yet, inasmuch as the breach of the provisions did not operate as a forfeiture, the plaintiff was not entitled to a decree for *khas* possession DHARANI KANTA LAHIRI *v.* SIBA SUNDARI DEBI, (1908) I. L. R. 35 Calc. ...1069

[G]uardian and ward—*Bond by guardian—Liability of minor—Bond keeping alive debt incurred for necessaries, when binds minor's estate—Personal liability of minor—Limitation.*

The general proposition that a guardian of a minor cannot bind his ward personally by a simple contract debt, by a covenant or by any promise to pay money or damages, is subject to the modification that the promise will not bind the minor, unless it has been made merely to keep alive a debt for which the ward's property was liable. *Indur Chunder Singh* v. *Radhakishore Ghose*, I. L. R. 19 Calc. 507; L. R. 19 I. A. 90, *Subramania Ayyar* v. *Arumuga Chetty*, I. L. R. 26 Mad. 330, referred to. Where the promise is to pay money; which has been expended for necessaries, the estate of the minor may be liable not on the promise, but because the money has been supplied. *Sundararaja Ayyangar* v. *Pattanathusami Tevar*, I. L. R. 17 Mad. 306, referred to. It is

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Marriage—*Presumption of marriage from cohabitation with habit and repute in Siamese Shan States—Presumption different in different countries—Proof of repute—Entry of "wife" in Consular Certificate of Nationality given to British subjects in Siam—New point taken on appeal.*

A domiciled Burman having a residence and a wife in Moulmein went on business to the Siamese Shan States where he lived for many years with the first appellant and died there leaving her and her son (by him), the second appellant, both of whom claimed a share of his property from his wife in Moulmein, who was his administratrix, on the ground that a presumption of marriage arose from the above cohabitation with habit and repute, whereby she had acquired the status of a legitimate wife —*Held*, that the habit and repute, which alone is effective, must be habit and repute of that particular status which in the country in question was lawful marriage. Among English people open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up as a matter of fact a repute of marriage. But that is not the case in countries where customs are different, and where there exist connexions between the sexes not reprobated by opinion, but not constituting marriage. *Held*, in the circumstances of, and evidence in, this case, that there was no proof of repute, which required some body of neighbours, or some sort of public, nor was there any tangible evidence of the recognition of the first appellant in her quality of wife by people external to the

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Marriage—*contd.*

house and independent of it. The only evidence pointing to marriage was the use of the word "wife" by some of the witnesses, which showed that they applied it to persons, whose status was not

the sister-in-law, who on no theory was a British subject The facts of the existence of the lawful wife in Burma, who was ignorant that any such connexion existed between her husband and the first appel-

customary, were against any such presumption of marriage. No presumption, therefore, arose that the first appellant had acquired the status of a wife. A contention that the second appellant, even if a valid marriage was not proved, was entitled by Burmese law to a share in his father's estate, not having been raised in the pleadings nor taken in the Courts below, was not entertained by the Judicial Committee on appeal. MA WUN DI *v.* MA KIN (1907), I. L. R. 35 Calc. 232

Marriage, nullity of—*Deceased wife's sister—Illegitimate child—Custody of the child—Maintenance.*

Where a decree for nullity of marriage had been made on the ground that the petitioner was the

to come into Dhanna Singh's hands. It is noted in the pedigree table that "Most of the co-sharers of the village being in straitened circumstances, absconded or absented themselves. Out of the proprietary body Sirdar Dhanna Singh alone remained in possession of the entire land. It would appear, therefore, clear that the village had been acquired practically in its entirety by Dhanna Singh in consequence of the abandonment of his relatives and collaterals. In regard to such land it has been laid down in Punjab Record No. 31 of 1894 that it should be considered ancestral. At page 88 of that judgment it is remarked 'Considering that this was a portion of the family ancestral holding, and fell to Sham Singh owing to its abandonment by a near relative we think that this portion of the estate should be held to be governed as regards alienations, by the same rule as that which applies to that part of the estate, which is admittedly ancestral' We think that this particular land is not removed from the category of ancestral property, merely because it came to Sham Singh owing to the abandonment thereof by a near relative rather than by simple inheritance These principles are in no way traversed in the judgment in Punjab Record No 81 of 1901, which is by a single Judge, the circumstances in that case being quite different from those in this. We think, therefore, that it must be presumed that the land in Dhanna Singh's hands before the village was evacuated in order that Kanwar Nau Nihal Singh might make a garden of it, must be considered to have been then ancestral. It is impossible to differentiate between the portions, which came from relatives and co-sharers and the portions which may have, in some instances, been purchased.

"It appears, however, that Kanwar Nau Nihal Singh 'about fifty years ago (i.e., about 1842) caused the village to be evacuated, for he intended planting a garden there.' These are the words on this point in the pedigree table of 1892-93. It does not appear how far this intention was ever carried out, or whether the depopulation and evacuation went beyond the village site It appears that, when Sardar Nau Nihal Singh wished to start his garden, Sardar Dhanna Singh started another village site—abadi—on the lands of the hunting ground known as Shikargah and that abadi remained as the village site of Tungbala—the old site, which had been destroyed or depopulated to make room for the garden being included as nazul property in Amritsar. It does not appear whether Sardar Nau Nihal Singh ever intended to, or ever did, take up the cultivated lands of Tungbala, which would have made a very large garden. The word used in connection with the garden is 'tamir' which suggests the idea that a walled and enclosed garden was intended. The idea was not carried out, but the new abadi for Tungbala, which Dhanna Singh had started, remained as the abadi of Tungbala and the old one was incorporated in Amritsar. It does not appear whether or not Dhanna Singh was ever dispossessed of any part of the culturable lands, if he was, apparently, they were almost immediately restored intact. Some neighbouring villages were destroyed to make the hunting ground of Maharaja Kharak Singh, but this was not the case with Tungbala, and we are quite unable to find from the record that there was any such confiscation and break of ownership in regard to Tungbala as would bring the case within the purview of the ruling in *Ram Nandan Singh v. Janki Koer*(1). Even if the land was taken up by Sardar Nau Nihal Singh

(1) (1902) I. L. R. 29 Calc. 828 L. R. 29 I. A. 178.

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the old village of Tung is that included in Chhambwala well where all the Tung Jats have proprietary rights, so it might reasonably be supposed that the Sardar's ancestral lands were also in the lands of this well, and, if so, no part of the lands of this well is in dispute."

The Chief Court of the Punjab (*Mr. J. A. Anderson* and *Mr. F. A. Robertson*), on appeal held that the property was ancestral; that the sum of Rs 5,480 was properly incurred for legal necessity; and that Rs. 3,500 had been received by the defendants as the value of certain shops sold in Amritsar. In accordance with these findings the Chief Court made a decree, declaring that the plaintiff was not affected by the deed of sale, except to the extent of Rs. 1,980, which amount remained charged on the land.

The material portion of the judgment was as follows:—

The next point to consider is whether or not the property was ancestral and whether Thakar Singh has any locus standi to sue. It was suggested in general terms that the conditions of the agreements are so monstrous that the question of locus standi is in some remote way affected by the fact, but no serious ground was put forward, upon which it would be possible to admit that the plaintiff has any locus standi or could obtain the relief sought; unless it be held that the property is ancestral. However unfair the agreements may be, and however much one of them may or may not be open to animadversion, we are clear that, unless the property be held to be ancestral, the suit must fail. We therefore proceed at once to what is the main point in the case and what has been the crucial point throughout, *i.e.*, is the property in suit 'ancestral' in whole or in part in the sense in which that term is understood under the customary law. 'Ancestral property' for the purposes of this suit means property, which was held by an ancestor, who is the common ancestor of the parties. In this case, therefore, it would mean property held by any direct ancestor of Dyal Singh and of Dhanna Singh.

Extracts from the remarks recorded on the pedigree tables of Mauza Tungbala at the Settlement records of 1865 and 1892-93 are on the record and from them there appears to be no doubt that the village was originally founded by a Tung Jat, who was the common ancestor of the defendants, Dyal Singh and Dhanna Singh. In the pedigree table prepared at settlement, Dyal Singh and Dhanna Singh are shown as descended from one Harji. No doubt in the Sikh times the stronger members of a family got more than their shares and we find from the remarks recorded in 1892-93 that the entire land had practically come into the hands of Dhanna Singh Lands given up by other co-sharers and coming to Dhanna Singh in virtue of his relationship and of the fact that the land had been held by a common ancestor of the absconder and Dhanna Singh would clearly be held to be ancestral. Some portions may have been derived from other proprietors of their holdings only by purchase or simple acquisition in their absence, but the main portions would appear to have been left by the other Tung relatives

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v. *Janki Koer*(1) Even if the land was taken up by Sardar Nau

(1) (1902) I. L. R. 29 Calc. 828 : L. R. 29 I. A. 178.

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for a short period, which is by no means established, it appears to have been restored intact, and there was no such break of continuity as to deprive the property of its ancestral character. We hold, therefore, on a full consideration of all the facts disclosed by the record that that part of the property must be classed as ancestral.

"This being so, Thakar Singh clearly had the necessary locus standi to contest the alienation and it can only be maintained in so far as it may be found to be for necessity, as regards the interests of the plaintiff. As regards Dyal Singh himself, of course, the matter appears to be at an end."

On this appeal, which was heard ex parte:—

De Gruyther, K.C., for the appellants contended that the property in suit was not ancestral: the Chief Court was in error in deciding that it was. The onus of proving that it was ancestral property was on the respondent, and he had not succeeded in doing so. Even if the property descended, as the Chief Court assumed, it would not be ancestral property either in law or in fact. The cases referred to by the Chief Court were distinguishable from the present case, and the evidence did not show that any ancestral property, that Dhanna Singh may have held, was the property in suit. The boundaries of the self-acquired property and what may have been ancestral were not defined, and it was therefore, as the District Judge remarked, impossible to give positive proof that the property, the alienation of which the respondent sought to set aside, was ancestral property. Conjectures, however reasonable, were insufficient. Reference was made to Mayne's Hindu Law, 7th ed., page 343, para. 275 and *Ram Nundun Singh* v. *Janki Koer*(1).

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The judgment of their Lordships was delivered by

LORD COLLINS. This is an appeal from a decree of the Chief Court of the Punjab varying a decree of the District Judge of Amritsar. The suit was brought by Thakar Singh and his brother, Kehr Singh, minors, by their mother acting as next friend, to set aside a deed of sale made on the 7th May 1894 by their father Dyal Singh to the appellants and certain other persons as purchasers, on the ground that the lands, the

(1) (1902) I. L. R. 29 Calc. 828; L. R. 29 I. A. 178.

subject-matter of the sale, were, in the view of the Hindu law, ancestral, and that the sale was not necessary, and was for a fictitious consideration and in fraud of the rights of the plaintiffs' father, Dyal Singh, as next heir and reversioner on the death of the widow of Dhanna Singh, the deceased owner. Kehr Singh died, while the suit was pending. The only question in dispute on this appeal is whether the lands were ancestral. The District Judge has held that they were not, the Chief Court has reversed his decision and held that they were.

It is not disputed that the onus on this issue is on the plaintiffs, and it is because in the opinion of the District Judge they failed to discharge this onus, that the suit was dismissed.

It is through their father, as heir of the above-named Dhanna Singh, that the plaintiffs claimed, and unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, through whom the plaintiffs also in like manner claimed, they are not deemed ancestral in Hindu law. Therefore, if the plaintiffs cannot show that they were not self-acquired lands in the hands of Dhanna Singh, the suit fails. Now, as the District Judge points out, there is really no evidence that the lands in question came to Dhanna Singh by descent at all. There is evidence that he acquired some lands in the district by purchase from the owners, and there is a probability that he acquired others by the abandonment of other persons, who may have been collateral, and, in that way, may have become possessed of lands which, by the custom of the Punjab, would be regarded as ancestral. But there is no evidence whatever defining the boundaries of these portions of land respectively. Indeed, the learned Judges of the Chief Court themselves say . "It is impossible to differentiate between the portions, which came from relatives and co-sharers and the portions, which may have, in some instances, been purchased." But it is by reason of this impossibility that the plaintiffs failed to prove their case The learned District Judge also points out that, since the death of Dhanna Singh, large portions of the land held by him have been sold by his widow, and it is quite possible that all the ancestral land, if he had any, was embraced in these sales, and that the sale of the lands in question embraced exclusively

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self-acquired lands. Their Lordships agree that, when the onus lies, as it does in this case, on the plaintiffs in seeking to set aside on such grounds a solemn deed executed by their father, conjectures cannot be accepted as a substitute for proof. With the greatest respect to the Judges of the Chief Court their Lordships venture to think that they have hardly given sufficient weight to this consideration. Their Lordships agree with the conclusion and reasoning of the learned District Judge, and will humbly advise His Majesty that the appeal be allowed and the decree of the Chief Court set aside with costs. The respondent must pay the costs of this appeal, except so far as they may have been increased by the delay, which has taken place in the prosecution of the appeal.

Appeal allowed.

Solicitors for the appellants: *Watkins & Lempriere.*

J. V. W.

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Rent Recovery Act (X of 1859), ss 160, 161—*Order refusing to re-hear an appeal decided* ex-parte *—Appeal against such order—Civil Procedure Code (Act XIV of 1882), ss. 560 and 588.*

An appeal, which was preferred under section 160 of Act X of 1859, was heard *ex-parte*; an application to set aside the *ex-parte* judgment was dismissed by the Appellate Court Against the order of dismissal, on an appeal to the High Court, a preliminary objection being taken that no appeal lay :—*Held*, that by virtue of sections 560 and 588 of the Code of Civil Procedure, which were applicable to appeals under Act X of 1859 the appeal lay to the High Court. HARE KRISHNA MAHANTI *v.* BISHNU CHANDRA MAHANTI (1908), I. L R. 35 Calc. 799

Renunciation and retractation: *See* PROBATE, APPLICATION FOR ... 156

Republication of seditious articles: *See* SEDITION ... 141

Repute, proof of : *See* MARRIAGE 232

Rescue from lawful custody—*Assault to deter public servant from discharge of duty—Arrest by duffadar for theft not committed in his presence—Theft, whether a continuing offence—Penal Code (Act XLV of 1860), ss 225, 353 and 379—Village Chaukidari Act (Bengal Act VI of 1870) s 39, cl (2).* The arrest by a *duffadar* of a person for theft on complaint made to him, but not committed in his presence is il cgal under s. 39(2) of Bengal Act VI of 1870, and neither the rescue of such person from his custody nor the threat to beat him does amount to any offence under s 225 or s. 353 of the Penal Code The offence of theft is not a "continuing" one. BOLAI DE *v.* EMPEROR (1907), I. L. R. 35 Calc 361

Res judicata—*Civil Procedure Code (Act XIV of 1882), s 13—Competency of Court to try the previous and the subsequent suit*—

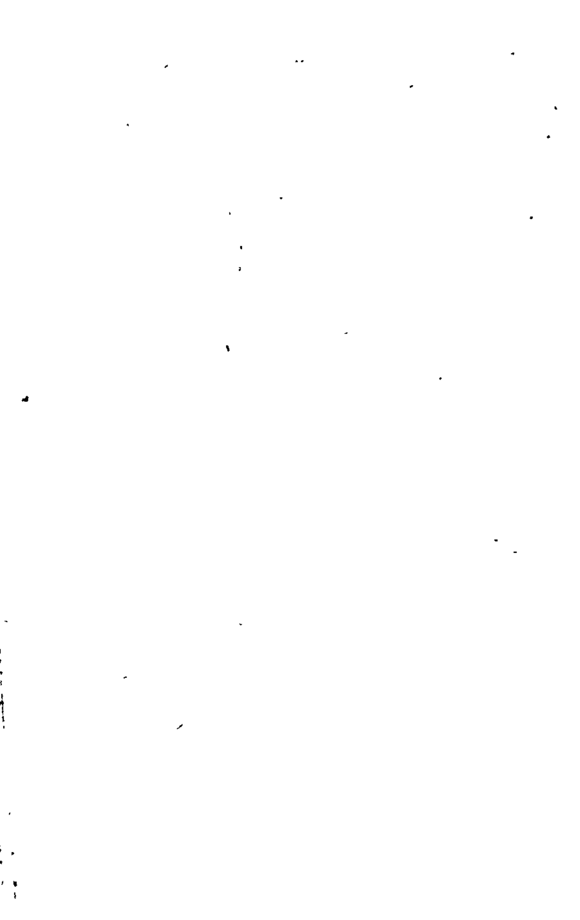
Res judicata—*concld.*

Concurrent jurisdiction. Under the present Code of Civil Procedure, in order to establish the plea of *res judicata*, it has to be shown that the Court of concurrent jurisdiction, which decided the former suit, was a Court of jurisdiction competent to try the subsequent suit. *Toponidhee Dhir Gir Gosain v. Sreeputty Sahanee*, I. L. R. 5 [illegible]

of possession of property so conveyed, and to have the *kobala* granted by *B* to his vendee set aside; the suit was decreed in favour of *A* on the ground that *B* had no share in the disputed land and that no relationship existed between *A* and *B* In a subsequent suit brought by *B* in the Court of the Subordinate Judge, for a declaration of his title to an eight annas share in a certain property a portion of which was covered by the aforesaid *kobala*, and for joint possession thereof with *A* the defence was that the suit was barred by *res judicata*, or at least it was so with respect to that portion of the disputed property, which was the subject-matter of the previous litigation :—*Held*, that the suit was not so barred. *Bhugwanbutti Chowdhrani* v. *A. H. Forbes*, I L R. 28 Calc. 78, distinguished SHIBO RAUT *v.* BABAN RAUT, (1908) I. L R 35 Calc, ... 353

———— *Civil Procedure Code (Act XIV of 1882) s, 13, Expl. II—Rent, suit for—Previous rent-suit—Decree, ex parte.*

The limitation that for explanation II of section 13 of the Code of Civil Procedure to have any application, the subject-matters of the two suits must be the same is not to be found in section 11 itself. *Rajendra Nath Ghose* v. *Tarangini Dasi*, 1 C L. J 248, explained. The words ' the matter directly and substantially at issue has been





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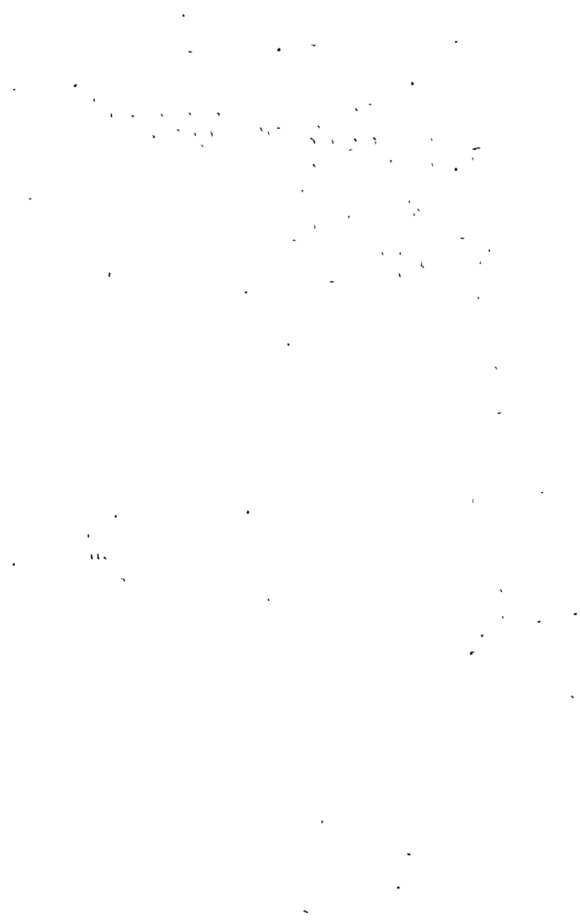


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Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	In Urdu	...	0	0	8	[1a.]
Ditto (as passed)	In Nagri	...	0	0	8	[1a.]
Act V of 1888 (Inventions and Designs) ...	In Urdu	...	0	2	8	[1a.]
Act VI of 1888 (Debtors) ...	In Urdu	...	0	0	6	[1a.]
	" Nagri	...	0	0	6	[1a.]
Act VII of 1888 (Civil Procedure Amendment)	In Urdu	...	0	1	9	[1a.]
	" Nagri	...	0	1	9	[1a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	In Urdu	...	0	0	6	[1a.]
	" Nagri	...	0	0	6	[1a.]
Act II of 1889 (Measures of Length) ...	In Urdu	...	0	0	8	[1a.]
	" Nagri	...	0	0	8	[1a.]
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904 ..	In Urdu	...	0	1	9	[1a.]
	" Nagri	...	0	2	0	[1a.]
Act VI of 1889 (Probate and Administration)	In Urdu	...	0	0	6	[1a.]
	" Nagri	...	0	0	6	[1a.]
Act VII of 1889 (Succession Certificates) .	In Urdu	...	0	1	6	[1a.]
Act X of 1889 (Ports), as modified up to 1st June, 1894	In Urdu	...	0	5	0	[2a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895	In Urdu	...	0	2	8	[1a. 6p.]
	" Nagri	...	0	3	0	[1a. 6p.]
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904	In Urdu	...	0	0	9	[1a.]
	" Nagri	...	0	0	9	[1a.]
Act XVI of 1889 (Central Provinces Land Revenue)	In Urdu	...	0	1	6	[1a.]
	" Nagri	..	0	1	6	[1a.]
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu	...	0	0	8	[1a.]
Act I of 1890 (Revenue Recovery) .	In Urdu	...	0	0	8	[1a.]
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881)	In Urdu	...	0	0	8	[1a.]
Act V of 1890 (Indian Forest and Burma Forests Amendment)	In Urdu	...	0	0	6	[1a.]
Act VI of 1890 (Charitable Endowments)	In Urdu	...	0	0	6	[1a.]
Act VIII of 1890 (Guardians and Wards)...	In Urdu	...	0	2	8	[1a. 6p.]
Act IX of 1890 (Railways), as modified up to 1st June, 1905	In Urdu	...	0	8	0	[2a.]
Act IX of 1890 (Railways), as modified up to 1st May, 1896	In Nagri	...	0	8	0	[2a.]
Act X of 1890 (Press and Registration of Books Amendment)	In Urdu	...	0	0	8	[1a.]
Act XI of 1890 (Prevention of Cruelty to Animals)	In Urdu	...	0	0	8	[1a.]
Act XVIII of 1890 (Emigration Amendment)	In Urdu	...	0	0	8	[1a.]
Act XIX of 1890 (Salt Amendment) ...	In Urdu	...	0	0	8	[1a.]
Act XX of 1890 (North-Western Provinces and Oudh) ... — ...	In Urdu	...	0	1	0	[1a.]
Act V of 1891 (Ports Act Amendment) ...	In Urdu	...	0	0	8	[1a.]
Act X of 1891 (Indian Criminal Law Amendment)	In Urdu	...	0	0	8	[1a.]

Act			Rs.	A.	P.	
Act XII of 1897 (Local Authorities Emergency Loans)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act XV of 1897 (Cantonments)	In Urdu	...	0	0	8	[1a.]
Act I of 1898 [Stage-Carriages Act (1861) Amendment]	In Urdu	...	0	0	3	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act III of 1898 (Lepers)	In Urdu	...	0	0	6	[1a.]
	„ Nagri	...	0	0	6	[1a.]
Act IV of 1898 (Indian Penal Code Amendment)	In Urdu	...	0	0	8	[1a.]
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1900	In Urdu	...	1	4	0	[8a.]
	„ Hindi	...	1	6	0	[8a.]
Act VI of 1898 (Post Office)	In Urdu	...	0	2	0	[1a.]
	„ Nagri	...	0	2	0	[1a.]
Act IX of 1898 (Live-stock Importation)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act X of 1898 (Indian Insolvency Rules) ...	In Urdu	...	0	0	8	[1a.]
Act I of 1899 [Indian Marine Act (1887) Amendment]	In Urdu	...	0	0	6	[1a.]
	„ Nagri	...	0	0	6	[1a.]
Act II of 1899 (Stamp), as modified up to 31st August, 1905	In Urdu	...	0	7	0	[6p.]
	„ Nagri	...	0	7	0	[6p.]
Act III of 1900 (Prisoners), as modified up to 1st March, 1905	In Urdu	...	0	2	8	[1a.]
	„ Nagri	...	0	2	8	[1a.]
Act IV of 1899 (Government Buildings) ...	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act V of 1899 (Indian Evidence)... ...	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act VI of 1899 (Indian Contract Act Amendment)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment]	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act VIII of 1899 (Petroleum)	In Urdu	...	0	0	9	[1a.]
	„ Nagri	...	0	0	9	[1a.]
Act IX of 1899 (Arbitration)	In Urdu	...	0	0	9	[1a.]
	„ Nagri	...	0	0	9	[1a.]
Act XI of 1899 (Court-fees Amendment) ...	In Urdu	...	0	0	9	[1a.]
	„ Nagri	...	0	0	6	[1a.]
Act XII of 1899 (Currency Notes Forgery)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act XIII of 1899 (Glanders and Farcy) ...	In Nagri	...	0	2	0	[1a.]
Ditto, as modified up to 1st April, 1902 ...	In Urdu	...	0	2	0	[1a.]
Act XIV of 1899 (Tariff Amendment)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act XVII of 1899 (Indian Registration Amendment)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	3	[1a.]
Act XVIII of 1899 (Land Improvement Loans Amendment)	In Urdu	...	0	0	3	[1a.]
	„ Nagri	...	0	0	3	[1a.]
Act XX of 1899 (Presidency Banks) ...	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act XXI of 1899 (Central Provinces Tenancy Amendment)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act XXIV of 1899 (Central Provinces Court of Wards)	In Urdu	...	0	1	8	[1a.]
	„ Nagri	...	0	1	8	[1a.]

Act / Regulation	Language	Rs.	a.	p.	Postage
Act XV of 1903 (Extradition), as modified up to 1st December, 1904	In Urdu	0	1	9	[1a.]
	„ Nagri	0	1	9	[1a.]
Act XVI of 1903 (Central Provinces Municipal)	In Urdu	0	4	0	[1a. 6p.]
	„ Nagri	0	4	0	[1a. 6p.]
Act I of 1904 (Poisons)	In Urdu	0	0	6	[1a.]
	„ Nagri	0	0	6	[1a.]
Act III of 1904 (Local Authorities Loan)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act IV of 1904 (North-West Border Military Police)	In Urdu	0	0	9	[1a.]
Act VI of 1904 [Transfer of Property (Amendment)]	In Urdu	0	0	3	[1a.]
	„ Nagri	0	0	3	[1a.]
Act VII of 1904 (Ancient Monuments Preservation	In Urdu	0	0	9	[1a.]
	„ Nagri	0	0	9	[1a.]
Act VIII of 1904 (Indian Universities)	In Urdu	0	1	8	[1a.]
	„ Nagri	0	1	8	[1a.]
Act X of 1904 (Co-operative Credit Societies)	In Urdu	0	1	0	[1a.]
	„ Nagri	0	1	0	[1a.]
Act XI of 1904 (to revive and continue section 8B of the Indian Tariff Act, 1894)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act XII of 1904 (Emigration)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act XIII of 1904 (Indian Articles of War)	In Urdu	0	0	3	[1a.]
	„ Nagri	0	0	3	[1a.]
Act XV of 1904 [Indian Stamp (Amendment)]	In Urdu	0	0	3	[1a.]
	„ Nagri	0	0	3	[1a.]
Act I of 1905 [Local Authorities Loan (Amendment)]	In Urdu	0	0	3	[1a.]
	„ Nagri	0	0	3	[1a.]
Act II of 1905 [Indian Universities (Validation)]	In Urdu	0	0	3	[1a.]
	„ Nagri	0	0	3	[1a.]
Act III of 1905 (Indian Paper Currency)	In Urdu	0	0	9	[1a.]
	„ Nagri	0	0	9	[1a.]
Act IV of 1905 (Indian Railway Board)	In Urdu	0	0	3	[1a.]
Act VI of 1905 (Court-fees Amendment)	In Urdu	0	1	6	[1a.]
	„ Nagri	0	0	8	[1a.]
Act VII of 1905 (Bengal and Assam Laws)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Regulation I of 1890 (British Baluchistan Laws)	In Urdu		......		[1a. 6p.]
Regulation V of 1890 (British Baluchistan Forests)	In Urdu	0	2	0	[1a. 6p.]
Regulation VI of 1893 (Hazara Forests)	In Urdu	0	2	0	[1a. 6p.]
Regulation VIII of 1896 (British Baluchistan Criminal Justice)	In Urdu	0	0	9	[1a.]
Regulation IX of 1896 (British Baluchistan Civil Justice)	In Urdu	0	2	8	[1a.]
Regulation III of 1901 (Frontier Crimes)	In Urdu	0	2	6	[1a.]
Regulation IV of 1901 (Frontier Murderous Outrages)	In Urdu	0	0	6	[1a.]
Regulation VII of 1901 (North-West Frontier Province)	In Urdu	0	4	8	[1a.]

1907

SECRETARY OF STATE FOR INDIA v. KARUNA KANTA CHOWDHRY.

MOOKERJEE J.

It is clear that in the view I take, the conclusion of the Courts below that the assessment which the plaintiff challenges was illegal and *ultra vires*, is well-founded on reason and principle and this appeal must consequently be dismissed with costs.

I may add that it is unnecessary to consider whether cesses could have been legitimately assessed on the basis of the amount payable by the ijaradars to the Fakirs; if such assessment had been made, two questions would arise, namely, *first*, are the ijaradars the persons in the actual use and occupation of the land, and, *secondly*, is the amount payable by them, rent for land? I do not express any final opinion upon these questions as I do not wish to prejudge matters; it is sufficient to say that the assessment now in question has not been made on such basis, is *ultra vires*, and cannot stand.

Appeal dismissed.

CH. B.

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APPEAL FROM ORIGINAL CIVIL.

APPELLATE CIVIL.

CIVIL REFERENCE.

CIVIL RULE.

CRIMINAL REVISION.

TESTAMENTARY JURISDICTION.

1907

JAIRAM MAHTON v. EMPEROR.

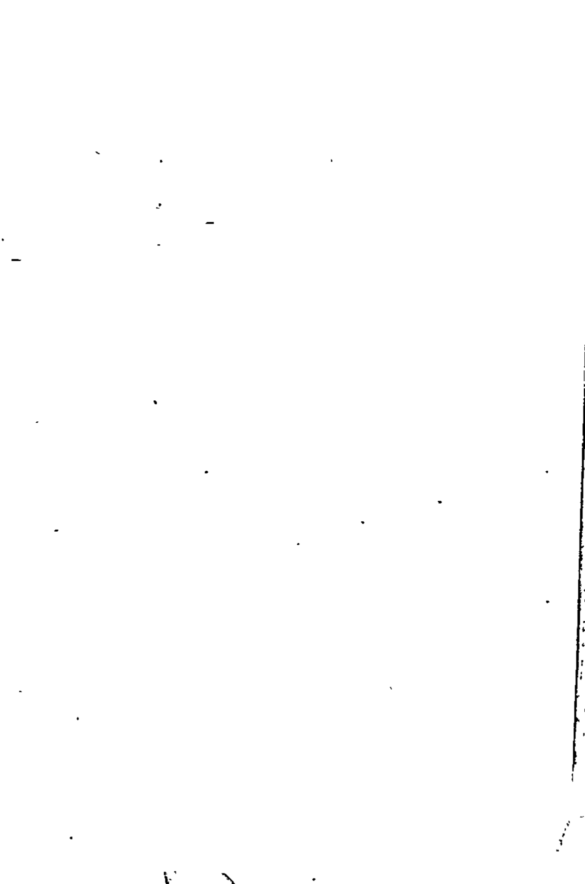
the entry by the petitioners. He with his party then went on the land and remonstrated and some of them tried to unyoke the cattle, in consequence of which a riot occurred during which the complainant and his brother were hurt.

The petitioners were tried by the Sub-Deputy Magistrate of Bihar who, on the 24th April 1907, convicted them under s. 147 of the Penal Code and sentenced them to six months' rigorous imprisonment and a fine of Rs. 100 each. On appeal to the District Magistrate of Patna the convictions and sentences were upheld.

Mr. Jackson (*Babu Surendra Nath Roy* and *Babu Satyendra Nath Roy* with him), for the petitioners, relied on the facts. The petitioners had obtained a *thika* of the land from one of the co-sharers on the expiry of the complainant's lease. Under the title so given them they entered the land and were in actual possession when the opposite party came and wanted to unyoke the cattle instead of invoking the aid of the authorities. The petitioners were acting in the exercise of the right of self defence : see *Queen* v. *Mitto Sing*(1), *Birjoo Singh* v. *Khub Lal*(2), *Shunkur Singh* v, *Barmuk Mahto*(3).

MITRA AND CASPERSZ JJ. This case has arisen, like most cases under section 147 of the Indian Penal Code, from a dispute as to possession of land. The complainant claimed the land to be his ancestral *rayati* of which he had been continuously in possession for a long series of years. The petitioner, Jairam Mahton, claimed to have possession of the land under a *thika* from the common zemindar, Mahip Narain Singh, who had recently executed a lease in his favour for the land. The complainant was paying rent at the rate of Rs. 24 and odd annas. The petitioner, Jairam Mahton, agreed to pay rent at the rate of Rs. 32 *per annum*. For a few months before the occurrence, the land must have been left uncultivated, and when the season for cultivation and sowing came, the petitioners went there with three

(1) (1865) 3 W. R. (Cr.) 41. (2) (1873) 19 W. R. (Cr.) 66.
(3) (1875) 23 W. R. (Cr.) 25.



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JAIRAM MAHTON v. EMPEROR

though the complainant was justified in trying to retain possession and in trying to oust Jairam as the wrong doer for the time being, he also would not have been justified in using force to dispossess Jairam who was in actual occupation. Thus, both sides acted in contravention of the law, complainant in entering upon the land and in trying to unyoke the cattle instead of having recourse to the public authorities, and Jairam in having forcibly entered upon the land, in ploughing it, and in uprooting the castor plants.

Assuming, again, that Jairam and his party had the right of private defence of property, they have not been convicted of the offence of voluntarily causing grievous hurt. The hurt caused to Kripa and Etwari, may, therefore, be deemed to have been simple, and there is no finding that the petitioners used more force than was necessary.

The decision of this case, however, must rest on a consideration of the broad question whether the petitioners were justified in entering upon the land, and ploughing it, and uprooting the castor plants. If they were not justified, they were clearly members of an unlawful assembly, the common object of which was to enforce a right or supposed right for the exercise of which they were prepared to use force.

The authorities on the question are apparently conflicting. But each case must be decided on its own facts; and it is difficult to lay down any general principle regulating all cases of a similar nature but with important shades of difference.

In *Ganouri Lal Das* v. *Queen-Empress*(1), the facts were these. A party consisting of more than five persons went to a spot on a river bank, the river flowing through the land of the defendants, for the purpose of either repairing or erecting a *bund* across it, in order to cause the water to flow down a channel on to the land of the complainant. They arrived at about 10 A.M. and proceeded to work on the *bund* until the afternoon. At about 4 P.M. a large number of men armed with *lathis* and headed by the accused, servants of the principal defendant, went to the spot and attacked the complainant's men who were wounded with *lathis*. It was found that the defendants had the right

(1) (1889) I. L. R. 16 Calc. 206.

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(1) (1889) I. L. R. 16 Calc. 206.

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fact, unsafe to attempt to lay down any general rule. The plea which is generally set up in these cases is that the accused had the right of private defence of property. The question of possession thus becomes one of great importance. But possession may mean complete possession, that is, possession during the previous period with a right to possession at the time of the occurrence, and it may only mean actual possession, or mere occupation, immediately before the occurrence.

In a case coming under Chapter VIII of the Indian Penal Code (Offences against the Public Tranquillity), the question as to who was in actual occupation just before the occurrence took place is of paramount importance, and a right to possession, or constructive possession, is not generally of much importance. If a person has the right to possession, and was in law constructively in possession, but was not in actual occupation just before the occurrence, he may ordinarily have recourse to the proper authorities for the prevention of any wrong to him, and he should not be allowed to plead *the right of private defence of property*. The right of private defence of property is a restricted right. Section 99 of the Indian Penal Code expressly lays down that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities, and it, also, lays down that the right of private defence in no case extends to doing more harm than is necessary for the purpose of defence. Sections 100 to 105 make the right depend on the circumstances of each case. No man has the right to take the law into his own hands for the protection of his person or property if there is a reasonable opportunity of redress by recourse to the public authorities. Referring to *Hyde* v. *Graham*(1), Holloway J., in *Madras High Court Proceedings, 8th January 1873*(2), says: "The natural tendency of the law of all civilized States is to restrict within constantly narrowing limits the right of self help, and it is certain that no other principle can be safely applied to a country (like this) . . . . ." The right of self help, when it causes, or is likely to cause, damage to the person or property of another person must be restricted, and recourse to public authorities must be insisted on. If a person

(1) (1862) 1 H. & C. 593. (2) (1873) 7 Mad. H. C. App. xxxv.



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kind. He attempted to prevent the perpetration of an unlawful act. He might have had recourse to the proper authorities for the prevention of the wrongful act, and redress in other ways, but that was no justification of the conduct of the petitioners, for, even if they had a right to the land, they took the law into their own hands.

We are, therefore, of opinion that the accused have been properly convicted under section 147 of the Indian Penal Code. But, at the same time, we are of opinion that the sentence of six months' rigorous imprisonment, and a fine of one hundred rupees each, is somewhat severe. No lasting injury was done to the complainant's party, though they were hurt. The accused were charged under section 325 of the Indian Penal Code, but that charge was not substantiated. There was an important question of right raised between the parties, and we are, therefore, at liberty to diminish the severity of the punishment upon the petitioners. We affirm the convictions but reduce the sentences of imprisonment from six months to six weeks each, and we reduce the sentences of fine to Rs. 10 each. In default of payment of fine, each of the petitioners is directed to undergo additional rigorous imprisonment for three weeks.

Rule discharged.

E. H. M.

1907

MULCHAND LALA v. KASHI-BULLAV BISWAS.

whether the above clause amounts to a stipulation to pay interest as contemplated by the proviso in Art. I of Schedule I of the Indian Stamp Act. A sentence containing no verb (as in the above clause) cannot mean any promise or stipulation. It is a patent ambiguity, and under section 93 of the Indian Evidence Act oral evidence cannot be given to show its meaning or supply its defect. Under section 29 of the Indian Contract Act, agreements the meaning of which is not certain are void.

In the Indian Stamp Act (II of 1899) the following proviso has been inserted in Art. I, Schedule I:—'Provided that such acknowledgment does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property.' The Legislature has not said within the category of what documents an acknowledgment containing a stipulation to pay interest should be placed and has not also specified the amount of stamp duty leviable on it. It seems to me that this proviso about interest is not controlled by section 23 of the Stamp Act, for otherwise the proviso would be quite useless and inoperative.

Now, the acknowledgment sued on cannot be held to be a bond, for besides being unattested it contains no express promise to pay interest. It cannot be treated as a promissory note, for there is no promise to pay on demand. I do not know whether it can be treated as an agreement.

For the above reasons I refer the following questions for the opinion of the Hon'ble High Court —

Whether the document sued on is sufficiently stamped with a stamp of one anna, or whether it is insufficiently stamped; if insufficiently stamped, what is the amount of stamp duty leviable on it?

My opinion on the above question is that the document is an acknowledgment of debt and sufficiently stamped since the absence of the word 'দিব,' or I will pay, shows that there is no stipulation to pay interest in a strict sense of the word. Interest therefore cannot be allowed to plaintiff.

The interest clause is vague and unmeaning and cannot be enforced.

I am not sure of the correctness of my opinion and hence I feel the necessity for making this reference."

The Junior Government Pleader (Babu Sirish Chandra Choudhury), for the Crown.

The judgment of the Court (RAMPINI, A.C.J., CASPERSZ AND SHARFUDDIN JJ.) was as follows:—

This is a reference made by the Munsif of Jangipur, second Court, through the District Judge of Murshidabad, on a question of stamp law.

The question referred to us is, whether the document sued upon in this case is sufficiently stamped with a stamp of one anna, or whether it is insufficiently stamped, and, if insufficiently stamped, what is the amount of stamp-duty leviable upon it?

CIVIL RULE.

Before the Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Sharfuddin.

1907
Aug. 8.

KARTIK RAM BHAKAT
v.
EMPEROR.*

Prosecution, order for—Jurisdiction—Criminal Procedure Code (Act V of 1898) s. 476—Prosecution for offence committed before predecessor in office—Practice.

The petitioner swore an affidavit, making certain allegations against a peon, in a suit pending in the Court of the Additional Munsif of R., who ordered an enquiry. On the transfer of that Officer, the suit was made over to the 2nd Munsif, and the enquiry was continued by the 1st Munsif of the place who under section 476 of the Criminal Procedure Code ordered the prosecution of the petitioner for making a false affidavit:—

Held, that the affidavit having been filed before the Additional Munsif, the 1st Munsif had no jurisdiction to make the order.

Begu Singh v. *Emperor*(1) followed.

Runga Ayyar v. *Emperor*(2) not followed.

THE petitioner, Kartik Ram Bhagat, obtained this Rule calling upon the District Magistrate of Murshidabad to show cause why an order made by the 1st Munsif of Raghunathganj under section 476 of the Criminal Procedure Code directing the prosecution of the petitioner for making a false affidavit before the Additional Munsif of that place, who had already been transferred from Raghunathganj, should not be set aside.

Babu Baidya Nath Dutt and *Babu Tarakeshwar Pal Chowdhry*, for the petitioner.

The Deputy Legal Remembrancer (*Mr. Douglas White*) shewed cause.

Cur. adv. vult.

* Civil Rule No. 1672 of 1907.

(1) (1907) I. L. R. 34 Calc. 551. (2) (1905) I. L. R. 29 Mad. 331.

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KARTIK RAM BHAKAT v. EMPEROR.

Mr. Douglas White, who appears for the Crown, admits that the order of the Munsif is contrary to the views of the majority of the Judges in the Full Bench case above referred to. He admits that the views of the majority in that case may in cases of transfer of the individual Officer before whom a false statement is made lead to a failure of justice, as may have taken place in the present case. He also cites the case of *Runga Ayyar* v. *Emperor*(1), in which a view contrary to that taken by the majority of the Judges in *Begu Singh* v. *Emperor*(2) has been expressed.

We are, however, bound to follow the Full Bench decision of this Court. We must accordingly make the Rule absolute, and set aside the order of the 1st Munsif complained of, which we accordingly do.

Rule absolute.

S. CH. B.

(1) (1905) I. L. R. 29 Mad 331. (2) (1907) I. L. R. 34 Calc. 551.

case, the question arose as to the legality of a contract, under a farming lease from the owner of a hât, to collect a portion of the proceeds of sale from persons exposing their goods for sale in the hât under temporary sheds or in open places. It was ruled by this Court that the dues which were let in farm, were not in the nature of internal duties, and that there was nothing

NOTE TO BINDER.

These pages should be substituted for pages 101, 102 in the January number of the Reports.

.... within the description of "annual value of land," as defined in the Cess Act, because it is not rent payable either by cultivating raiyats of land or by persons in the actual use or occupation of land. In this view of the matter and upon the facts of this particular case, I would answer the first question referred to the Full Bench as follows: The profits of the *mela* cannot be lawfully assessed with Road and Public Works cesses when the land on which such *mela* is held is not used for agricultural purposes but is so used during the rest of the year.

As regards the second question, namely, whether the case of *Umed Rasul Shaha Fakir* v. *Anath Bandhu Chowdhuri*(1) has been correctly decided, my answer is that it was correctly decided, in so far as it held that the profits of the *mela* were not assessable with cesses, but that the reasons assigned for the conclusion are open to criticism, specially the reason that "because these profits are liable to be assessed with income-tax, therefore, they are not liable to be assessed with cesses." As was pointed out in the judgment of this Court in the case of *Manindra Chandra Nandi* v. *The Secretary of State for India*(2), it cannot be affirmed as an absolute and unqualified rule of law that the same sum of money may, under no circumstances, be liable to be assessed with income-tax and cesses. In each case, the answer must depend upon the nature of the sum, and the applicability of the provisions of the Cess Act and Income-tax in relation thereto.

(1) (1901) I. L. R. 28 Calc. 637 (2) (1907) I. L. R. 34 Calc. 257.

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but he refused to interfere; whereupon they moved the High Court and obtained the present Rule.

Mr. Casperss (*Babu Joygopal Ghose* with him), for the first party. The Magistrate has a discretion to proceed either under s. 107 or s. 145: see *Sheoraj Roy* v. *Chatter Roy*(1), and *In the matter of Ekram Singh*(2).

Mr. Huq (*Babu Sarat Kumar Mitra* with him), for the petitioners, relied on *Dolegobind Choudhry* v. *Dhanu Khan*(3), *Bejoy Singha Neogi* v. *Empress*(4), *Bidhu Bhusan Chatterji* v. *Annoda Churn Kanangui*(5).

[FLETCHER J. referred to *King-Emperor* v. *Basiruddin Mollah*(6).]

MITRA AND FLETCHER JJ. The dispute in this case concerns *water* and the word "water" includes fisheries. The police recommended in their report that a proceeding under section 145 of the Code of Criminal Procedure should be drawn up between the parties; but the Deputy Magistrate thought otherwise, and he drew up a proceeding, under the directions of the District Magistrate, under section 107 of the Code. The result has been that the petitioner, the second party, has been bound down to keep the peace for one year.

It is clear from the judgment of the Deputy Magistrate as well as that of the District Magistrate that the dispute in this case is a *boná fide* one relating to a fishery right, and a large number of documents has been put in on either side to prove the rights of the respective parties and the right to possession to each. In the case of *Dolegobind Chowdhry* v. *Dhanu Khan*(3), which is a case very similar to the present one, the learned Judges directed that the order under section 107 of the Code of Criminal Procedure, binding down one of the parties, should be set aside, and they expressed their opinion that a proceeding under section 145 of the Code of Criminal Procedure was the proper proceding. Looking to the words used in section 107 and in section 145, we have

(1) (1905) I. L. R. 32 Calc. 966.
(2) (1899) 3 C. W. N. 297.
(3) (1897) I. L. R. 25 Calc. 550.
(4) (1899) 3 C. W. N. 463.
(5) (1902) 6 C. W. N. 883.
(6) (1903) 7 C. W. N. 746.

CRIMINAL REVISION.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

JAIRAM MAHTON

v.

EMPEROR.*

1907

July 15.

Rioting—Entry on land in possession of another—Temporary occupation—Unlawful assembly—Private defence, right of—Penal Code (Act XLV of 1860) ss. 99, 101, 104, 147.

The petitioners went with three ploughs on land to which the complainant had the right of possession, and of which he was in possession till such entry, and began to plough up the land, to uproot some castor plants and throw them away. While they were thus in actual but temporary occupation, the complainant and his party went on the land and tried to unyoke the cattle, whereupon a riot took place:—

Held, that the petitioners were not justified in entering on the land, in ploughing it, uprooting the plants and throwing them away, that they were members of an unlawful assembly the common object of which was to enforce a right or supposed right for the exercise of which they were prepared to use force, and that their action in beating the complainant's party was not justified by the fact of their having obtained temporary occupation.

The right of private defence of property is a restricted one.

Gasouri Lal Das v. *Queen-Empress*(1), *Pachkauri* v. *Queen-Empress*(2), *Poresh Nath Sircar* v *Empror*(3), and *Queen Empress* v. *Tirakadu*(4) referred to.

The observations of Holloway J. in 7 Mad H. C. Proceedings(5) cited and approved.

The petitioners, Jairam Mahton and others, under the alleged title of a *thika* from one of the co-sharers, went upon some land in the village of Yakoobpur Jamasari with three ploughs, and commenced to plough the land, to uproot some castor plants and throw them into the river. The complainant was found to have had the right of possession and to have been in possession prior to

* Criminal Revision No 682 of 1907, against the order of W. B. Thomson, District Magistrate of Patna, dated May 13, 1907, affirming the order of B. Moitra, Sub-Deputy Magistrate of Bihar, dated April 24, 1907.

(1) (1889) I. L. R. 16 Calc. 206.

(2) (1897) I. L R. 24 Calc. 686.

(3) (1905) I. L. R. 33 Calc. 295.

(4) (1890) I. L R. 14 Mad. 126.

(5) (1873) 7 Mad. H. C. Ap. xxxv.

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It is clear from the judgment of the Deputy Magistrate as well as that of the District Magistrate that the dispute in this case is a *bonâ fide* one relating to a fishery right, and a large number of documents has been put in on either side to prove the rights of the respective parties and the right to possession to each. In the case of *Dolegobind Chowdhry* v. *Dhanu Khan*(3), which is a case very similar to the present one, the learned Judges directed that the order under section 107 of the Code of Criminal Procedure, binding down one of the parties, should be set aside, and they expressed their opinion that a proceeding under section 145 of the Code of Criminal Procedure was the proper proceding. Looking to the words used in section 107 and in section 145, we have

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ploughs and began to plough the land, and it is said that they uprooted some of the castor plants which they threw into the river. They thus anticipated the complainant, in taking tangible possession, and so were actually in occupation when the complainant's brothers, Kripa and Etwari, came to the land and protested. Kripa and Etwari also tried to unyoke the cattle, whereupon a riot took place on the spot and the complainant and his party were beaten. The hurt caused to Kripa and Etwari was not very serious, but Kripa's right arm and right leg were broken.

The petitioners pleaded in defence to the charge that the lease in favour of the complainant had been executed in the year 1899 and expired in 1906, and as the land was the *khudkasht* or private land of the zemindar, Mahip Narain Singh, he had a right to re-enter upon it on the expiry of the lease given by him to the complainant. The lower Appellate Court has not decided the question whether the land was Mahip Narain's *khudkasht* or not, but it has come to the conclusion, and in our opinion correctly, that the zemindar could not forcibly dispossess the complainant. The complainant must, therefore, be held to have had the right to actual possession, and he was in possession until the petitioner Jairam with his men entered upon the land and began to plough it.

Whether, on these facts, the petitioners could plead *bona fide* possession of the land and whether they were justified in resisting the attempt of the complainant and his party to unyoke the cattle are the questions argued before us That the complainant could prevent Jairam and his party from entering upon the land of which he had been in actual possession, and was in constructive possesison on the date of the occurrence, and that the attempt by Jairam to gain possession was forcible and most unjustifiable cannot be doubted. Even if Jairam had the right to enter upon the land by reason of the tenancy of the complainant having legally terminated, neither the zemindar nor his tenant Jairam could forcibly take possession of the land. They were bound to proceed according to law. The action of Jairam in attempting to plough the land was clearly illegal. But he was, somehow or other, in actual occupation for at any rate a few hours; and

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to prevent the erection of the *bund;* but, in spite of this finding, they were convicted under section 147 of the Indian Penal Code; and it was held by this Court that the conviction was correct. The Court held that, notwithstanding that the accused had the right to prevent the erection of the *bund*, they were not justified in going in a number and using force when they could easily have gone to the proper authorities for preventing the illegal action of the complainant. Almost all the reported cases on the subject were reviewed in the judgment of this Court, and the learned Judges were of opinion that the right of private defence of property was restricted under the Indian Penal Code, and that "the Code confers the right of private defence not as against mere trespass but as against crime," and that, when there was opportunity to have recourse to the proper authorities, no right of private defence of property existed so as to protect against the perpetration of crime.

In *Pachkauri* v. *Queen-Empress*(1), the complainant's party were about to take forcible possession of the land of which the accused were in actual possession for the time being. While they were engaged in ploughing, the complainant's party came up and interfered with the ploughing. A fight ensued in the course of which one of the complainant's party was grievously wounded, and he subsequently died, and two of the accused's party were hurt. The Court held that, if the accused were in possession of the land, and found it necessary to protect themselves from aggression on the part of another body of men, they were justified in taking such precautions as they thought were required and in using such force or violence as was necessary to prevent the aggression. In *Poresh Nath Sircar* v. *Emperor*(2), the accused obtained possession in a proceeding under section 145 of the Criminal Procedure Code, and were legally in possession, though, for the time being, the other side had taken forcible possession. The accused attempted to protect their right declared by a competent tribunal, and it was held that they were justified in their action.

It is not necessary to refer to other cases on the subject as we are of opinion that no positive general rule of law applicable to all cases can be gathered from the reported decisions: it is, in

(1) (1897) I. L. R. 24 Calc. 686. (2) (1905) I. L. R. 33 Calc. 295.

CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

1907
Aug. 29.

UMATUL MEHDI
v.
KULSUM.*

Land Registration—Land Registration Act (Beng. VII of 1876) ss. 52, 55, 62—Reference to Civil Court, conditions of—Possession, meaning of, in s. 55—Mahomedan Widow—Dower, claim for—Jurisdiction—Revision by High Court, power of.

When a person alleges that he has by succession acquired an interest in an estate and is in possession of such interest, and on this basis, seeks registration of his name, if his claim is disputed by any other person who sets up a conflicting claim in respect of the same interest, the Collector must enter into the question of possession. If he finds that possession is with the applicant and that the title set up is also proved, he may enter his name in the register. If, however, it is not proved to his satisfaction that any person is in possession of the disputed interest, he may either determine summarily the right to possession and deliver possession accordingly or he may make a reference to the Civil Court which may determine summarily the right to possession and deliver possession accordingly.

When a Mahomedan widow has obtained possession of the undistributed property of her deceased husband lawfully and without force or fraud, she is *primâ facie* entitled, as against the other heirs of her husband to retain possession until her dower-debt, or any portion of it which is due and unpaid, is paid.

The jurisdiction which the Civil Court acquires upon a reference to it under s. 55 of the Land Registration Act is that of a Civil and not of a Revenue Court, and its decision is subject to revision by the High Court.

CIVIL RULE.

Nawab Sabdar Hossain Khan died on the 7th August 1905 leaving considerable landed properties in the districts of Monghyr, Gya and Patna. The petitioner, who is the daughter of the maternal uncle of the said Sabdar Hossain Khan, was married to him and upon his death took possession of his estate. On the 15th November 1905, the opposite party Musummut Kulsum, the sister of the father of Sabdar Hossain, applied for registration

* Civil Rule No. 2251 of 1907.

to prevent the erection of the *bund;* but, in spite of this finding, they were convicted under section 147 of the Indian Penal Code; and it was held by this Court that the conviction was correct. The Court held that, notwithstanding that the *accused had the right to prevent the erection of the bund,* they were not justified in going in a number and using force when they could easily have gone to the proper authorities for preventing the illegal action of the complainant. Almost all the reported cases on the subject were reviewed in the judgment of this Court, and the learned Judges were of opinion that the right of private defence of property was restricted under the Indian Penal Code, and that "the Code confers the right of private defence not as against mere trespass but as against crime," and that, when there was opportunity to have recourse to the proper authorities, no right of private defence of property existed so as to protect against the perpetration of crime.

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Mooradoonnissa(1) and *Mussummut Bachun* v. *Hamid Hossein*(2). The Subordinate Judge has found that the petitioner is in possession and that she came into possession peaceably under claim of title *primâ facie* well founded in law. No ground whatever can be suggested why such possession should not be recognized by the Revenue Courts for the purpose of registration.

The Advocate-General (*The Hon'ble Mr. O'Kinealy*), (*Mr. S. M. Ahmed, Moulavi Shamsul Huda* and *Moulavi Mustafa Khan* with him), for the opposite party. The order made by the Subordinate Judge was made in the exercise of a special statutory jurisdiction and is therefore not an order in a "case" in which this Court can exercise its revisional powers under s. 622 of the Civil Procedure Code.

The Subordinate Judge has decided correctly that the petitioner has no right to retain possession of the disputed properties for the satisfaction of her claim for the dower. "Possession" in s. 55 of the Land Registration Act means "lawful possession," if the title of a person is established, the possession under s. 55 must be assumed to be in him in the eye of the law even though the actual possession may be in some one else. In England it has been held that if a freehold land in the occupation of a tenant for years passes by descent, the heir is immediately seised in fact and this is not altered by the occupier paying rent by mistake to another: *Bushby* v. *Dixon*(3).

BRETT AND MOOKERJEE JJ. The order which we are called upon to revise in the present rule was made by the Subordinate Judge of Patna under section 59 of the Bengal Land Registration Act of 1876. The circumstances under which the order in question was made are not in controversy before this Court and may be briefly outlined. One Nawab Sabdar Hossain Khan, a wealthy zemindar of Husnabad, in the district of Monghyr, died on the 7th August 1905. He left considerable landed properties

(1) (1855) 6 Moo. I. A. 211.
(2) (1871) 10 B. L. R. 45; 14 Moo. I. A. 377.
(3) (1824) 3 B. & C. 298; 27 R. R. 362.

prefers to use force in order to protect his property, when he could, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable by the Indian Penal Code. No matter what the intention of that person may be, the law says that he must not use force in such a case To hold otherwise would be to encourage and put a premium on offences of rioting which are so frequent in this part of India. The country would, in the language of Holloway J., "be deluged with blood," if an offender who could get relief by recourse to law were allowed to take the law into his own hands.

In *Queen-Empress* v. *Tiraladu*(1), Muttusami Ayyar J., speaking of the words "to enforce a right or supposed right" in section 141, said—"It is perfectly immaterial whether the act which one seeks to prevent by the use of criminal force is legal or illegal, the test of criminality being the determination to use criminal force and act otherwise than in due course of law so as to threaten the public peace." Redress must be sought in ways other than the use of force by the person who thinks that he has been illegally dispossessed or is entitled to possession of property.

Then, again, assuming that an accused is entitled to plead the right of private defence of property, the exercise of force must be regulated according to the nature of the action which is taken by the opposite side and which requires such an exercise of force. The danger to property may be imminent and incapable of redress if measures are not immediately taken. The law, however, provides that no more force should be used than is necessary. The question in each case, therefore, must be to what extent force may be used, and this is a question of fact.

In the present case, the complainant's right to prevent the ploughing by the accused must, on the findings, be upheld. The petitioners were uprooting the castor plants and throwing them into the river. They were wantonly committing mischief. The counter action of the petitioners in beating the complainant's party could not be justified by the fact of their having obtained temporary occupation.

The petitioners were undoubtedly members of an unlawful assembly. The complainant did not use force of an aggressive

(1) (1890) I. L. R. 14 Mad. 126.

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disallowed and possession delivered to the rightful heiress. The widow now seeks to have this order discharged, and upon her application the Rule under consideration was issued. The learned counsel who appears in support of the Rule has contended that the proceedings before the Subordinate Judge are vitiated by two defects, namely, *first*, that the Subordinate Judge had no jurisdiction to determine the matters in controversy as there was no valid reference to him by the Collector under section 55 of the Land Registration Act; and, *secondly*, that the Subordinate Judge has acted illegally in the exercise of his jurisdiction, if he had any, and he ought to have held that not only the actual possession of the properties but also the right to retain possession of them till the satisfaction of the dower-debt, was in the petitioner. It has been argued on the other hand by the learned Advocate General, *first*, that as the Subordinate Judge exercised a special statutory jurisdiction in aid and at the instance of the Revenue Court, this Court has no jurisdiction to revise his order and, *secondly*, that the Subordinate Judge was correct in his conclusion that the widow had no right to retain possession, temporary or otherwise, of the disputed properties in satisfaction of her claim for dower. To determine which of these contentions ought to prevail; it is necessary to refer for a moment to the leading provisions of the Land Registration Act applicable to the matter before us.

Section 42 provides that every person succeeding to the proprietary right in, or management of, estates shall apply to the Collector for registration of his name and the character and extent of his interest as such proprietor or manager. Section 48 provides for notice to possible objectors. Section 52 lays down the mode and scope of enquiry by the Collector. It provides that he has to ascertain the truth of the alleged possession of, succession to, or transfer of the estate or interest therein in respect of which registration is sought. Before the Collector can order the name of the applicant to be registered as proprietor of the estate or of any interest therein, he must satisfy himself that the possession exists or that the alleged succession or transfer has taken place, and that the applicant has acquired possession in accordance with such succession or transfer but not otherwise. This clearly contemplates two different classes of cases. The determination of

CIVIL REFERENCE.

Before the Hon'ble Mr. R. F. Rampini, Acting Chief Justice, Mr. Justice Caspersz and Mr. Justice Sharfuddin.

MULCHAND LALA

v.

KASHIBULLAV BISWAS.*

1907
July 30.

Stamp-duty—Agreement—Memorandum of agreement—Stamp Act (II of 1899) Sch. I, Art. 5, cl. (b)—Account—Stipulation to pay interest—Acknowledgment of debt.

An account written on a sheet of paper signed by the debtor and addressed to the creditor, and also containing a stipulation to pay interest, is not a mere acknowledgment of a debt on which a stamp duty of one anna is leviable under Art. 1, Sch. I of the Indian Stamp Act, but an agreement or memorandum of an agreement which requires a stamp of 8 annas, under cl. (b) of Art. 5, Sch. I of the Indian Stamp Act.

Laxumi Bai v. Ganesh Raghunath(1) followed.

THE plaintiff brought this suit for the recovery of Rupees 302 annas 13 as principal, and Rs. 163-0-0 as interest alleged to be due from the defendants under a *dastabej* (document), which contained an entry of Rs. 346-5, dated the 30th Jyet 1310, and another entry of Rs. 302-13 dated the 13th Aswin 1310. The document in question was written on a sheet of paper and stamped with a stamp of one anna. There was, however, a stipulation to pay interest at the rate of Re. 1-8 annas per cent. per mensem, and the Munsif of Jangipore, before whom the case came on for trial, being doubtful as to whether the said document had been sufficiently stamped, made the following reference to the High Court through the District Judge of Murshidabad:—

"The plaintiff has brought this suit to recover the sum of Rs. 302-3 annas principal and Rs. 163 interest on an acknowledgment of debt signed by defendant No. 1 on 30th Jyet 1310 B. S. The acknolwedgment bears a stamp of one anna and mentions interest Re. 1-8 annas per cent. per month, but contains no express stipulation to pay. The document contains this clause:—'Interest at the rate of Re. 1-8 annas per cent. per month on this money' The word 'दिव' or 'I will pay,' has not been written and it is therefore extremely doubtful

* Civil Reference No 8 of 1907.

(1) (1900) I. L. R. 25 Bom. 373.

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possession of the applicant in accordance with his application was not proved to his satisfaction. Under such a provision of the law, it might be open to the Collector to determine summarily the right to possession and deliver possession accordingly, so as to oust the third person; in the present amended form of section 55, however, the Collector is entitled to determine summarily the right to possession or make a reference to the Civil Court for the same purpose, only if no one is proved to be in possession of the interest in dispute. The essential pre-requisite for a reference to the Civil Court by the Collector is, therefore, an investigation by him into the question of possession and a conclusion that no body is proved to his satisfaction to be in possession. In the case before us, there was no such investigation by the Collector. The order of reference which he made shows on the face of it, that he did not direct his attention to the question, whether any person was in possession of the interest in dispute. It follows, therefore, that the reference was irregular and in contravention of the provisions of section 55. We may add that section 58 lays down the procedure when a reference has to be made under section 55, and one of the heads upon which the Collector has to furnish information to the Civil Court is "the circumstances of the case, as far as they are before the Court; and the reasons which have led him to make the reference." It is not enough, for the Collector to repeat the language of section 55 and to say that in his opinion the dispute ought to be properly determined by a Civil Court. He must state that it is not proved to his satisfaction that any person is in possession of the interest in dispute.

Section 59 next defines the procedure before the Civil Court on receipt of the reference. The Civil Court is to determine summarily the right to possession in respect of the interest in dispute, subject to a regular suit, and to deliver possession accordingly. Section 62 provides that the summary decision of the Court under section 59 shall have no other effect than that of settling the actual possession, but for such purposes, it shall be final and not subject to any appeal or order for review.

Upon a review of these provisions of the Land Registration Act, the following conclusion appears to us to be reasonably plain. When a person alleges that he has by succession, as in the present

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The document in question is an account, written on a sheet of paper. It contains, first, an entry of a sum of Rs 346-5 pie as being due to the plaintiff. This was signed on the 30th Jaisto 1310 B S., and the account is addressed to Srijut Babu Mulchand Lala, that is, the plaintiff. Then it goes on to say—"This amount will bear interest at the rate of Re. 1-8 annas per cent. per mensem" This entry of Rs. 346-5 pie and the entry on the top of the account are said to have been written by the debtor, Kashibullav Biswas, on the 30th Jaisto 1310. Now, that is not the debt for which the plaintiff at present sues. He alleges that the Rs. 346-5 pie have been paid up; but he sues for another debt of Rs. 302-3 annas of which there is an entry made by the debtor in the same account on the 13th Aswin 1310. This entry is made on the same sheet as the former entry of Rs. 346-5 pie and under the same heading in which there is a stipulation that the amount will bear interest at Re. 1-8 annas per cent. per mensem. Now, it is the plaintiff's case that the entry of Rs. 302-3 annas dated the 13th Aswin 1310, was made subject to the condition stated in the heading of the account, namely, that this amount should bear interest at the rate of Re. 1-8 annas per cent. per mensem. It therefore seems to us that it is not a mere acknowledgment of a debt, on which a stamp duty of one anna is leviable, under Art. i, Sch. I of the Indian Stamp Act, but an agreement or memorandum of an agreement, which requires a stamp of 8 annas under cl. (*b*) of Art. 5 of Schedule I of the Indian Stamp Act. This is certainly so on the plaintiff's own showing. In support of our decision we may refer to the case of *Laxumi Bai* v. *Ganesh Raghunath*(1), in which a similar document was in dispute, and in which it was held that a stamp-duty of 8 annas was leviable.

With these observations we return the reference to the District Judge of Murshidabad for his information and that of the Munsif, second Court, Jangipur.

A copy of this decision should also be forwarded to the Secretary to the Board of Revenue, under section 60 of Act II of 1899, for his information.

(1) (1900) I. L. R. 25 Bom. 373.

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the Court of King's Bench that where a free-hold land in the occupation of a tenant for years, passes by descent, the heir is immediately seised in fact, and this is not altered by the occupier paying rent by mistake to another. Mr. Justice Bayley stated that where there is no one in possession at the death of the ancestor, there must be an actual entry by the heir to give him the seisin in fact. But when there is a tenant, his possession becomes that of the heir immediately on the death of the ancestor. The subsequent misconduct of the tenant in paying rent to another person, or the mistake of the heir as to his rights, cannot by relation alter the nature of the seisin which he had before. This decision, founded on the ancient learning of the seisin, may be treated as good law and was in fact relied upon by Lord Selborne in *Lyell* v. *Kennedy* (1). But it has no application to the present case. It may be conceded that under the Land Registration Act, a person who claims to have acquired an interest in an estate by succession or transfer and to be in possession by virtue of such title, is not entitled to be registered merely upon proof of possession. He must show that his possession is not wrongful and is attributable to the title which he sets up. But it does not follow, conversely, that, if he proves his title merely, but not his possession, he is entitled to have his name registered. As a wrongdoer in possession is not entitled to claim registration, so the rightful owner, if out of possession, is not entitled to claim registration merely on the ground that the legal possession is in him. To hold otherwise, would be to ignore the clear distinction between possession and right to possession which is recognised in sections 52 and 55. In the case before us, it has been found that the petitioner, the widow, is in possession of the estate by receipt of rent from the lessees. It is not quite accurate to describe this as constructive possession. In the case of zemindaries where the proprietor can be in possession only by receipt of rent, he is in actual possession of his interest, if he is in receipt of rent. The zemindar's possession of the right to collect rent from the tenants in occupation is actual possession of a tangible property: *Sarbananda Bose*

(1) (1889) 14 App. Cas. 437.

1907
KARTIK RAM BHAKAT v. EMPEROR.

RAMPINI, A.C.J., AND SHARFUDDIN, J. This is a Rule calling on the District Magistrate of Murshidabad to shew cause why an order of the 1st Munsif of Raghunathganj under section 476 Criminal Procedure Code directing the prosecution of the petitioner for making a false affidavit before the Additional Munsif should not be set aside.

The facts of the case are that the petitioner is the son of a person who had a suit before the Additional Munsif of Raghunathganj. In this suit the processes against the defendant were returned unserved. The peon, Satish Chandra Singh, reported that he could not serve the summonses because the defendants did not reside in the village they were alleged to live in, nor had they any house in that village and that they had gone home to the district of Jessore. The petitioners' father then presented a petition to the Additional Munsif supported by an affidavit sworn to by the petitioner, in the 3rd para. of which it was stated that the report of the peon who went to serve the summonses is false. The summons was subsequently served by another peon on the defendant in the village mentioned by the plaintiff, and the Additional Munsif ordered an enquiry to be made into the conduct of the peon. The Additional Munsif was then transferred and the suit in which the petitioner's father was plaintiff was made over to the 2nd Munsif, but the miscellaneous proceeding in which the conduct of the peon was the subject of the enquiry was continued by the 1st Munsif. He came to the conclusion that the report of the peon was correct, and called upon the petitioner to show cause why he should not be prosecuted. The petitioner did not appear. The 1st Munsif then under section 476 directed his prosecution before the Magistrate of Jangipore.

It is contended that the prosecution of the petitioner is contrary to the decision of a Full Bench of this Court in *Begu Singh* v. *Emperor*(1) which lays down that such an order can only be passed by the Officer before whom the false statement was made and not by his successor. The Munsif, who shows cause, contends that his action is in accordance with the views of Mr. Justice Geidt in that case.

(1) (1907) I. L. R. 34 Calc. 551; 11 C. W. N. 569.

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UMATUL MEHDI v. KULSUM.

the Court of King's Bench that where a free-hold land in the occupation of a tenant for years, passes by descent, the heir is immediately seised in fact, and this is not altered by the occupier paying rent by mistake to another. Mr. Justice Bayley stated that where there is no one in possession at the death of the ancestor, there must be an actual entry by the heir to give him the seisin in fact. But when there is a tenant, his possession becomes that of the heir immediately on the death of the ancestor. The subsequent misconduct of the tenant in paying rent to another person, or the mistake of the heir as to his rights, cannot by relation alter the nature of the seisin which he had before. This decision, founded on the ancient learning of the seisin, may be treated as good law and was in fact relied upon by Lord Selborne in *Lyell* v. *Kennedy* (1). But it has no application to the present case. It may be conceded that under the Land Registration Act, a person who claims to have acquired an interest in an estate by succession or transfer and to be in possession by virtue of such title, is not entitled to be registered merely upon proof of possession. He must show that his possession is not wrongful and is attributable to the title which he sets up. But it does not follow, conversely, that, if he proves his title merely, but not his possession, he is entitled to have his name registered. As a wrongdoer in possession is not entitled to claim registration, so the rightful owner, if out of possession, is not entitled to claim registration merely on the ground that the legal possession is in him. To hold otherwise, would be to ignore the clear distinction between possession and right to possession which is recognised in sections 52 and 55. In the case before us, it has been found that the petitioner, the widow, is in possession of the estate by receipt of rent from the lessees. It is not quite accurate to describe this as constructive possession. In the case of zemindaries where the proprietor can be in possession only by receipt of rent, he is in actual possession of his interest, if he is in receipt of rent. The zemindar's possession of the right to collect rent from the tenants in occupation is actual possession of a tangible property: *Sarbananda Bose*

(1) (1889) 14 App. Cas. 437.

CRIMINAL REVISION.

Before Mr. Justice Mitra and Mr. Justice Fletcher.

BALAJIT SINGH

v.

BHOJU GHOSE.*

1907
Aug. 21.

Fishery—Dispute relating to a fishery—Whether proceedings should be under s. 107 or s. 145, Criminal Procedure Code (Act V of 1898).

Where there is a *bonâ fide* dispute relating to a fishery right, the proper course for the Magistrate to adopt is to proceed under s 145 of the Criminal Procedure Code, and not under s. 107 The words in s. 145 are mandatory, while the language of s. 107 is discretionary.

Dolegobind Chowdhry v. Dhanu Khan(1) followed.

Upon the receipt of a police report praying for proceedings under s. 145 of the Criminal Procedure Code to be drawn up against Bhoju Ghose and others, the first party, and Balajit Singh and others, second party, on account of a dispute relating to the possession of a *jalkar*, the Sub-divisional Officer of Madhepura referred the case, by an order dated 15th January 1907, to the District Magistrate of Bhagalpore recommending proceedings under s. 107 of the Code. The District Magistrate, by his order of the 30th January, directed proceedings under s. 107 against the second party. This party in their written statement submitted that they were not going to commit a breach of the peace, and that the dispute being as to a *jalkar*, proceedings under s. 145 and not s. 107 should be drawn up.

On the 20th May 1907, the Deputy Magistrate passed an order directing the petitioners to execute a bond to keep the peace for one year in the amount of Rs. 200, with two sureties in half the amount each. The petitioners then moved the District Magistrate of Bhagalpore against the order binding them down,

* Criminal Revision No. 830 of 1907, against the order of F. F. Lyall, District Magistrate of Bhagalpore, dated June 29, 1907, affirming the order of Banku Behari Sing, Deputy Magistrate of Bhagalpore, dated May 20, 1907.

(1) (1897) I. L. R. 25 Calc. 559.

1907
UMATUL MEHDI v. KULSUM.

until her dower-debt is paid. But she must account for all profits received by her, and she cannot, in her capacity as creditor, transfer, sell, or mortgage the property, so as to affect their shares. It may be conceded that there has been some divergence of judicial opinion upon this point, as is indicated by the decisions of the learned judges of the Allahabad High Court in *Amanatunnissa* v. *Bashirunnissa* (1) and *Muhammad Karimullah Khan* v. *Amani Begam* (2). There is no foundation, however, for any suggestion that the widow has taken possession of the estate by force or fraud. Her possession is *primâ facie* lawful. If, therefore, she is in fact in possession as found by the Subordinate Judge, if such possession was not obtained by force or fraud, if she came into possession peaceably, and if the possession can be attributed to a claim of title *primâ facie* well-founded in law, it is not easy to perceive upon what ostensible ground it can be suggested that she is not in such possession of the property as the Revenue Courts will recognise for purposes of registration. It could never have been intended that either the Revenue Courts or the Civil Court on a reference by the Revenue Court, should enter into a minute examination of the authorities upon a difficult question of Mahomedan Law, and while professing to decide summarily the right to possession, practically come to a decision upon the question of title, as elaborate and exhaustive as in a regular suit. We must consequently hold that the order of reference made by the Collector in this case was in itself irregular, and that the Subordinate Judge upon the reference has exercised his jurisdiction illegally and with material irregularity; when he found upon the facts that the widow is in possession of the disputed property, as proprietor, by receipt of rent, that she is entitled to a large sum of money from the estate of her husband on account of her dower, and that she peaceably entered into possession upon the death of her husband and claims to hold possession not as a wrongdoer but upon an assertion of title which is *primâ facie* supported by judicial decisions of the highest authority, he ought not to have made an order the effect of which is to determine the question of title and to oust her from possession.

(1) (1894) I. L. R. 17 All. 77. (2) (1895) I. L. R. 17 All. 93.

no doubt that the proper course for the Magistrate in a case like this was to proceed under section 145 of the Code. The words in section 145 are mandatory. That section says—"Whenever a Magistrate of the District . . . . is satisfied, from a police report or other information, that a dispute likely to cause a breach of the peace exists concerning any land or water . . . . he *shall* make an order in writing," etc., etc. Section 107 contains words which are discretionary; the Magistrate *may* institute proceedings binding down either of the parties.

We are of opinion that this is a case which comes within the rule laid down in the case of *Dolegobind Choudhry* v. *Dhanu Khan*(1) referred to above. We accordingly make the Rule absolute, and direct that the order of the Deputy Magistrate binding down the petitioner under section 107 of the Code be set aside. It would be competent to the Magistrate, if he thinks it necessary, that is to say, if there is still likelihood of a breach of the peace, to draw up a proceeding under section 145 of the Code.

Rule absolute.

(1) (1897) I. L. R. 25 Calc. 550.

E. H. M.

1907
Umatul Mehdi v. Kulsum.

of the present case, we are satisfied that the exercise of our revisional powers is justified.

The result, therefore, is that this Rule must be made absolute; the order of the Subordinate Judge will be discharged and the petitioner will be maintained in possession pending the decision of the question of title in controversy between the parties in a regular suit as contemplated by the Land Registration Act. We further direct the Subordinate Judge to certify accordingly to the Collector under section 63 of the Land Registration Act. The petitioner is entitled to the costs of this Rule.

Rule absolute.

S. C. B.

1907
BALAJIT SINGH v. BHOJU GHOSE.

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Rule absolute.

(1) (1897) I. L. R. 25 Calc. 559.

E. H. M.

1907

KANTO RAM DAS v. GOBARDHAN DAS.

by the Subdivisional Magistrate, the former for offences under sections 193 and 210 of the Indian Penal Code and the latter for offences under sections $\frac{210}{109}$, $\frac{209}{114}$ and $\frac{193}{114}$ or "under any other section of the Indian Penal Code that might be found applicable."

Against the aforesaid order of the Munsif, dated the 17th June 1907, the present petitioner moved the High Court and obtained this Rule.

Babu Atulya Charan Bose, for the petitioner.

The Senior Government Pleader (Babu Ram Charan Mitter), for the opposite party.

RAMPINI, A.C.J., AND SHARFUDDIN, J. This is a Rule, calling upon the Munsif of Maulvi Bazar, Sylhet, and the opposite party Gobardhan Das, to show cause why the order of the Munsif dated the 17th June 1907, should not be set aside as being illegal.

The order of the Munsif dated the 17th June 1907, is one passed under section 476 Criminal Procedure Code directing that the petitioners, Kanto Ram Das and Krishna Charan Das, should be tried by the Sub-Divisional Magistrate, the former for offences under sections 193 and 210 Penal Code, and the latter for offences under section $\frac{210}{109}$, $\frac{209}{114}$ and $\frac{193}{114}$ "or under any other section of the Indian Penal Code that might be found applicable." The Munsif, Babu Amrita Nath Mitter, who passed this order, before making it, enquired most carefully into the facts of the case. They are as follows.

The petitioner Kanto Ram Das and his nephew Sarada Charan Das, obtained a decree for rent on the 1[illegible] y 1906 against the opposite party Gobardhan Das. The [illegible] amount was paid by the pleader of the judgment-deb[illegible] 14th February 1906, and a petition certifying full [illegible] was filed in Court. Notwithsta[illegible] this, the decr[illegible] is the petitioners Kanto R[illegible] and Sara[illegible] applied for execution of their [illegible] tioned d[illegible] November 1906 and attached [illegible] ent-deb[illegible] land was sold in execution [illegible], and [illegible] decree holders for Rs. 20. [illegible] conf[illegible] April 1907. It may here be [illegible] t all [illegible]

no doubt that the proper course for the Magistrate in a case like this was to proceed under section 145 of the Code. The words in section 145 are mandatory. That section says—"Whenever a Magistrate of the District . . . . is satisfied, from a police report or other information, that a dispute likely to cause a breach of the peace exists concerning any land or water . . . . he *shall* make an order in writing," *etc.*, etc. Section 107 contains words which are discretionary; the Magistrate *may* institute proceedings binding down either of the parties.

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Rule absolute.

(1) (1897) I. L. R. 25 Calc. 559.

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Against the aforesaid order of the Munsif, dated the 17th June 1907, the present petitioner moved the High Court and obtained this Rule.

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The petitioner Kanto Ram Das and his nephew Sarada Charan Das, obtained a decree for rent on the 1st February 1906 against the opposite party Gobardhan Das. The decretal amount was paid by the pleader of the judgment-debtor on the 14th February 1906, and a petition certifying full satisfaction was filed in Court. Notwithstanding this, the decree holders, that is the petitioners Kanto Ram Das and Sarada Charan Das, applied for execution of their abovementioned decree on the 29th November 1906 and attached the judgment-debtor's land. The land was sold in execution of the decree, and purchased by the decree holders for Rs. 20. The sale was confirmed on the 9th April 1907. It may here be mentioned that all the proceedings

of her name in the Collectorate in respect of the properties situated in the district of Patna, alleging that as Sabdar Hossain was governed by the Shia school of Mahomedan law, the petitioner, his childless widow, was not entitled to the estate and that she as sister of the father of Sabdar Hossain by right of inheritance, had succeeded to the properties. On the 9th January 1906, the petitioner made her objection on the ground that she by right of inheritance was entitled to the estate and that in any event she was entitled to retain possession till her dower, which she alleged was fixed at a sum of 5 lacs of rupees and 25 gold mohurs, was satisfied out of the profits.

On the 17th February 1906, the Deputy Collector made an order of reference to the Civil Court under s. 55 of the Land Registration Act. The petitioner applied to the superior revenue authorities but the Collector, the Commissioner and the Board of Revenue successively declined to interfere. The case was then heard by the Subordinate Judge of Patna who after holding a full investigation into the question of title and possession came to the conclusion upon the evidence that the petitioner was in possession of the properties by receipt of rent from the lessee, that she was not entitled to the estate by right of inheritance, that the dower debt claimed by her did not entitle her to take or keep possession of the properties, that the legal possession in the properties must be taken to be in Musummut Kulsum, the opposite party, and that consequently the objection of the widow should be disallowed and possession delivered to the rightful heiress.

The petitioner applied to have the order of the Subordinate Judge set aside, and thereupon this Rule was issued.

Mr. Jackson (*Mr. A. Chaudhuri* and *Moulavi S. M. Tahir* with him), for the petitioner. There was no valid reference by the Collector under s. 55 of the Land Registration Act to the Subordinate Judge and therefore he had no jurisdiction to determine the matters in dispute. Even if he had any, he has acted illegally in the exercise of his jurisdiction; he ought to have held that not only the actual possession but also the right to retain possession of the properties till the payment of the dower debt was in the petitioner: *Ameeroonnissa* v.

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before whom the offences are committed that can order a prosecution under section 476, and such power is exercisable only at or immediately after the conclusion of the trial in which the offences are alleged to have been committed; (iii) that the Munsif observes that the petitioner Kanto Ram Das is an old man and that it is his son, Krishna Charan, who looks after cases in which he is concerned. Hence, against Kanto Ram it is said the order of the Munsif is wrong on the merits.

As regards this third plea, we would only remark that the terms of the Rule preclude our entering into the merits of the case. The Rule is to show cause why the Munsif's order should not be set aside as being illegal.

Babu Ram Charan Mitter, who appears to oppose the rule, contends that the case is distinguishable from that of *Begu Singh* v. *Emperor*(1), that the accused are charged, *inter alia*, with an offence under sections 193 and 119 read with section 114 Penal Code, *i.e.*, for making and abetting the making of a false verification to the application for execution, and that for a prosecution for such offences the sanction of the Court, not of the officer, before whom the offences were committed is required: *Dharamdas Kamar* v. *Sagore Santra*(2), *Emperor* v. *Motla Fuzla Karim*(3). This may be, but according to the views of the majority of the Judges who decided *Begu Singh* v. *Emperor*(1) the summary power conferred by section 476 is exercisable only at or immediately after the conclusion of the trial in which the offence was committed.

The Munsif, Babu Amrita Nath Mitter, supports his order, by referring us to the views of Mr. Justice Geidt in *Begu Singh* v. *Emperor*(1). But Mr. Justice Geidt's opinion was not that of the majority of the Judges who formed the Full Bench. However that may be, Babu Ram Charan Mitter admits that the decision of this Court in *Hara Charan Mookerjee* v. *Emperor*(4), is a difficulty in his way. That case decides that the powers conferred by section 476 can only be exercised if the offences, in respect of which a prosecution is ordered, have come to the cognizance of the Court in a judicial proceeding. That case further

(1) (1907) I. L. R. 34 Calc. 551.
(2) (1906) 11 C. W. N. 119.
(3) (1905) I. L. R. 33 Calc. 193.
(4) (1905) I. L. R. 32 Calc. 267.

in the districts of Monghyr, Gya and Patna. The petitioner who alleges that she was the daughter of the maternal uncle of Sabdar Hossain was married to him, and the parties lived as husband and wife till the death of the former. Upon the death of her husband she took possession of his estates, the bulk of which was situated in the districts of Monghyr and Gaya. On the 15th November 1905, the present opposite party, Musummut Kulsum, who claims to be the sister of the father of Sabdar Hossain, applied for registration of her name in the Collectorate in respect of the properties situated in the district of Patna, upon the allegation that as Sabdar Hossain was governed by the Shia law, the petitioner, his childless widow, was not entitled to the estate, and that she as sister of the father of the deceased had succeeded to the properties by right of inheritance. On the 9th January 1906, the widow Umatul Mehdi preferred objection on the ground that she was entitled to the estate by right of inheritance as the daughter of the maternal uncle of Sabdar Hossain, and that in any event she was entitled to retain possession of the properties till her dower, which was alleged to have been fixed at a sum of 5 lacs of rupees and 25 gold mohurs, was satisfied out of the profits. The Deputy Collector heard the parties at considerable length, and on the 17th February 1906 made an order of reference to the Civil Court under section 55 of the Land Registration Act. The widow applied to the superior revenue authorities, but the Collector, the Commissioner and the Board of Revenue successively declined to interfere. The case was then taken up by the Subordinate Judge of Patna, and he held what is described as a summary enquiry, into the question of the right of possession in respect of the interest in the estate in dispute, but which in substance is as full an investigation into the question of title and possession as can take place in a regular suit. The Subordinate Judge came to the conclusion upon the evidence that the widow was in possession of the properties by receipt of rent from the lessees, that she was not entitled to the estate by right of inheritance, that the dower-debt claimed by her did not entitle her to take or keep possession of the properties, that the legal possession in the disputed properties must be taken to be in Musummut Kulsum and that consequently the objection of the widow must be

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Chitty.

1907
Sept. 27.

JAMAIT MULLICK
v.
EMPEROR.*

Judgment of Appellate Court—Defective judgment—Appellate Court's judgment not supplementary to that of first Court—Criminal Procedure Code (Act V of 1898) ss. 367, 424—Practice.

The judgment of an Appellate Court must show on the face of it that the case of each accused has been taken into consideration, and reasons should be given, as far as may be necessary, to indicate that the Court has directed judicial attention to the case of each accused.

The Appellate Court's judgment cannot be read in connection with, and as supplementary to, the judgment of the Court of first instance, but must be quite independent and stand by itself.

The petitioners, ten in number, together with seven others, were charged with bad livelihood, under s. 110 of the Criminal Procedure Code, before Jogendra Nath Chuckerbutty a Deputy Magistrate of Midnapore. The petitioners were directed by his order, dated the 17th June 1907, to execute bonds of Rs. 100 each, with two sureties in the same amount, to be of good behaviour for one year, and the other seven were required to execute similar bonds to be of good behaviour for two years.

The petitioners appealed to the District Magistrate who upheld the order of the first Court in the following terms:—

"In this case seventeen persons have been ordered to find security to be of good behaviour, seven of them for two years, and the ten appellants for one year. The case, as far as the former seven are concerned, was sent up to the Sessions Judge, and he has confirmed the order. Now the other ten prefer this appeal to me.

"The main grounds taken before me are that the accused have been prejudiced by a joint trial, that the case was instituted partly because of failure to detect the Atra dacoity case, and mainly because of a petition put in against the Police Inspector who supervised the inquiry in this case, charging him with assault,

* Criminal Revision, No. 1079 of 1907, against the order of D. Weston, District Magistrate of Midnapore, dated July 3, 1907.

the question of possession alone is sufficient when the applicant claims to have assumed charge as joint proprietor on behalf of his co-sharers or as manager; in such a case, the Collector need satisfy himself only on the one point of the possession of the applicant. When, however, the applicant claims to be proprietor by succession or transfer, the Collector has to satisfy himself on two points, namely, that the succession or transfer has taken place and that the applicant is in possession accordingly. In this latter case, therefore, the applicant cannot succeed unless both the elements are established. If the succession or transfer is proved, but possession is found against the applicant, his name cannot be registered, or, conversely, if possession alone is proved, but the succession or transfer is not established, that is, if the possession proved is not attributable to the title set up, the application for registration must be refused. Section 55 next deals with cases of dispute as to possession, succession, or acquisition by transfer. This section provides that if there is a dispute as to the possession, succession, or acquisition by transfer, by the applicant, of the extent of interest in respect of which he has applied to be registered, the Collector must, in the first instance, try to satisfy himself, whether any person is in possession of the interest in dispute. If it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute, the Collector may adopt one of two courses. He may either himself determine summarily the right to possession, deliver possession accordingly, and make the necessary entry in the register, or, if in his opinion the dispute is of a character which is properly determinable by a Civil Court, he shall refer the matter in dispute to the principal Civil Court of the district, for determination. It is obvious, therefore, that the first duty of the Collector in the case of dispute is to determine whether any person is in possession of the disputed interest. If possession is found to be with any person, the Collector has no jurisdiction summarily to oust him. This is manifest from the alteration which was made in section 55 of the Land Registration Act by section 1 of Act V of 1878. Under section 55 as it stood in Act VII of 1876 in its unamended form, the Collector was entitled to determine summarily the right to possession, if the

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one of the accused, and the name of not one single witness, appear in the judgment of the learned District Magistrate. We have not the slightest doubt, as he mentions in his explanation, that he made notes for his guidance, with reference to each of the accused, as to what the witnesses against him said and what the witnesses in favour of him said, and that before writing his judgment he considered the evidence against each man. But this cannot be considered sufficient. It must appear, on the face of the judgment, that the case of each accused has been taken into consideration, and reasons should be given, as far as may be necessary, to show that the Appellate Court has devoted judicial attention to the case of each accused. The necessity is the greater when, as in the present instance, a very large number of persons was jointly proceeded against and directed to furnish security for good behaviour. We are unable to accept the explanation that the appellate judgment may be read in connection with, and as supplementary to, the judgment of the Court of first instance. The appellate judgment must be quite independent and stand by itself.

The only order, therefore, that we can pass in the matter of this Rule is that the District Magistrate do re-hear the appeal, and consider the case of each petitioner on the evidence on the record. The Rule is accordingly made absolute.

Pending the re-hearing of the appeal by the District Magistrate, the petitioners will be released on bail to his satisfaction.

Rule absolute.

E. H. M.

case acquired an interest in an estate and is in possession of such interest, and on this basis, seeks registration of his name, if his claim is disputed by any other person who sets up a conflicting claim in respect of the same interest, the Collector must enter into the question of possession. If he finds that possession is with the applicant and that the title set up is also proved, he may enter his name in the register. If, however, it is not proved to his satisfaction that any person is in possession of the disputed interest, he may either determine summarily the right to possession and deliver possession accordingly or he may make a reference to the Civil Court which may determine summarily the right to possession and deliver possession accordingly. The learned Advocate-General contended that in section 55, the term "possession," means "lawful possession;" in other words, that if the title of a person is established, the possession under section 55 must be assumed to be in him in the eye of law, even though the actual possession may be with some one else. He further contended that it is not merely open to the Collector, but it is his duty to determine, in every case, the right to possession and to place the rightful owner in possession, so as to oust the person who is actually in occupation. This contention, however, is contrary to the provisions of section 52 which, as we have stated already, show clearly that the Collector must not only satisfy himself that the alleged succession or transfer has taken place but also that the applicant has acquired possession in accordance with such succession or transfer. If, as is contended by the learned Advocate-General, whenever it is found that *A* has succeeded to the estate of *B* or has obtained it by a transfer, it follows, as a matter of law, that *A* has acquired possession thereof, it would be wholly unnecessary for the Legislature to provide in section 52, as it has done, that the Collector must satisfy himself as to both the elements, namely, succession or transfer and the acquisition of possession in accordance with such succession or transfer. Section 52 shows plainly that unless both the elements are established, the Collector cannot order the name of the applicant to be registered. Reliance was, however, placed by the learned Advocate-General upon the case of *Bushby* v. *Dixon*(1), in which it was ruled by

(1) (1824) 3 B. & C. 298; 27 R. R. 362.

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to support the Government established by law, and to express with moderation any disapprobation he may feel of its acts and measures.

(v) That the re-publication of seditious articles from another newspaper, one of which only was filed as an exhibit by the prosecution and used in the case against the editor of that paper on his trial for sedition, was not a report of the proceedings of a Court of justice, and was not justifiable under the circumstances.

(vi) That the presumption contained in s. 7 of Act XXV of 1867, in the absence of evidence to the contrary, rendered the printer liable for seditious matters published in his paper.

The petitioner was the printer of the "*Bande Mataram*," a daily newspaper published in Calcutta. He was put on trial before the Chief Presidency Magistrate, with the alleged editor and the manager of the paper, for having published in the town edition of the 27th June 1907 and the *dâk* edition of the next day an unsigned letter addressed to the editor entitled "Politics for Indians," the material portions of which were as follows:—

"Methinks the time is approaching when the world will refuse to believe that the same race of Englishmen were instrumental in the abolition of the slave trade........ Mr. Morley has said that we cannot work the machinery of our Government for a week if England generously walks out of our country. While this supposition is not conceivable, did it not strike Mr. Morley that if, instead of walking out, the English were by force driven out of India, the Government will go on perhaps better than before, for the simple reason that the exercise of power and organization necessary to drive out so organized an enemy will, in the struggle that would ensue, teach us to manage our own affairs sufficiently well? The Government is fast becoming a Government of the evil genii, "oppressive as the most oppressive form of barbarian despotism," yet strong with all the strength of organization and the sinews of war, if not with all the strength of civilization. It was the same evil genii which a year ago tried the trick of decoying school-boys as a warning to refrain from the practice of boycott. It was the same evil genii who destroyed Hindu images and ravished Hindu women at Jamalpur and Mymensingh to strike terror into the hearts of those who advocated the use of country-made goods. It was the same evil genii who are now terrorizing the advocates engaged in defending the accused at Rawalpindi.... The spectacle of a merchant sovereign is so demoralising, so opposed to all oriental notions of sovereignty, and so subversive of justice, the scales of which the sovereign is expected to hold evenly between the merchant and the non-merchant, between the white and the black, that it is high time for the Indian Government .... to calmly look on the heavy exports of grain from the country, exposing the children of the soil to an eternal state of chronic starvation. We have heard of the Mahomedan mandate of the sword or the *Koran*. Perhaps some day the *fiat* will go out that British goods or the sword are the only two alternatives between which we have got to choose."

Mazumder v. *Pransankar Rai Choudhuri* (1), *Surb Narain Singh* v. *Brij Mohon Thakur* (2). When a person has proprietary interest in land and as such is entitled to receive rent, he is in possession of his interest if he is in receipt of rent, while his tenant who is in actual occupation has possession which, in a sense, is the possession of the landlord or superior proprietor: see the observations of Lord Davey in *Secretary of State for India* v. *Krishnamoni Gupta* (3).

If, therefore, a proprietor finds that the rent receiveable by him is intercepted by some other person, he is dispossessed of his interest in the land. He loses possession, because the only mode of enjoyment by which that possession can be held, ceases to be available by the act of the trespasser. If this principle be applied to the facts found by the Subordinate Judge in this case, what is the position? There can be no possible controversy that the widow is in possession of the proprietary interest in the disputed properties. The question, therefore, arises whether her possession is lawful. It may be observed that she sets up what is *primâ facie* a good title to possession. She alleges that she is entitled to a large sum of money as dower. According to her case, the amount is 5 lacs of rupees and 25 gold mohurs. According to the finding of the Subordinate Judge it is at least Rs. 41,000 and one gold mohur. Whatever the precise amount may be, as to which a determination is not necessary for our present purposes, she contends that she is entitled to remain in possession till the dower-debt has been satisfied. There is a considerable body of high authority in support of this view: see the decisions of their Lordships of the Judicial Committee in *Ameeroonnissa* v. *Mooradoonnissa* (4) and *Mussamut Bachun* v. *Hamid Hossein* (5). According to these cases, when a widow is in possession of the undistributed property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her dower or any portion of it, is due and unpaid, she is entitled, as against the other heirs of her husband, to retain such possession

(1) (1888) I. L. R. 15 Calc. 527.
(2) (1895) I. L. R. 23 Calc. 80.
(3) (1902) I. L. R. 29 Calc. 518; 6 C. W. N. 617.
(4) (1855) 6 Moo. I. A. 211.
(5) (1871) 10 B. L. R. 45; 14 Moo. I. A. 377.

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On the 6th August sanctions were granted against the manager and the printer of the "*Bande Mataram*" in the same terms as in the case of the editor, as set out above, and related to the same publications, and Superintendent Ellis made an application to the Chief Presidency Magistrate, on the 17th instant, against them as follows:—

"King-Emperor v. (1) Arabindo Ghose, (2) Hemendro Prosad Bagchi, (3) Apurbo Kumar Bose.

Charges under s. 124A of the Indian Penal Code

(1) Printing and publishing in the "*Bande Mataram*" of 28th June last an article headed "India for the Indians."

(2) Printing and publishing in the "*Bande Mataram*" of 26th July last certain seditious articles which originally appeared in the "*Jugantar*."

Prays for warrants of arrest against Nos. 2 and 3 on the above charges. Government sanctions enclosed.

(Sd.) M. B. ELLIS,
Superintendent, C. C. I. D"

Warrants were granted against the three accused on the 30th July and 17th August, respectively, as applied for. It appears that Superintendent Ellis was examined by the Magistrate on both occasions, but not on oath, and his depositions were not recorded.

The case against the accused was taken up on the 26th August, when an amended Government sanction, dated the 23rd instant, was filed by Superintendent Ellis; the previous sanctions of the 30th July and 6th August having misdescribed the article as "India for Indians" instead of "Politics for Indians." It was as follows:—

"Government of Bengal.

The sanction of Government is hereby accorded to the prosecution, under s. 124A of the I. P. C. of the editor, manager, printer and publisher of the "*Bande Mataram*," newspaper, for the publication of an article entitled "Politics for Indians" in the *dák* edition of the 28th June, and the corresponding town edition.

Copy forwarded to the Commissioner of Police, Calcutta, for information

E. A. GAIT,
Offg. Secy. to the Govt. of Bengal."

...np,
...7.

...t the accused then proceeded, and ended on ...ber in the acquittal of the editor and the

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and the definition of "complaint," which shows that it can be brought even against an unknown person. The section does not require the name of the complainant to be specified. The case of *Kali Kinkar Sett* v. *Nritya Gopal Roy*(1) is distinguishable. The application of Superintendent Ellis for warrants, coupled with his oral allegations and the orders of Government, constitute a complaint: *Queen-Empress* v. *Sham Lall*(2), *Jogendra Nath Mookerjee* v. *Emperor*(3). The mere fact of the examination of the complainant not being recorded, does not show that there was no examination. The omission to examine the complainant is only an irregularity: *Queen-Empress* v. *Monu*(4). The description in the first orders of the seditious article as "India for Indians" did not prejudice the accused, as he knew which article was meant. The signature of the Chief Secretary to the Government of Bengal raises a presumption that the authority of the Lieutenant-Governor was given: see s 114 of the Evidence Act. The section does not require the authority to be in writing or in any particular form, or to be signed by any particular person or to be addressed to any particular complainant; nor does it require a description of the seditious article. As to the re-productions from the *Jugantar*, s. 499 of the Indian Penal Code relates to defamation, but not to sedition. Section 7 of Act XXV of 1867 makes the printer *prima facie* liable for everything in the paper. He has not discharged the *onus* imposed on him under the section.

CASPERSZ AND CHITTY, JJ. This is a Rule calling on the Chief Presidency Magistrate, Calcutta, to show cause why the conviction and sentence passed on the petitioner should not be set aside. The learned Judges who granted the Rule did not restrict its operation in any way. We are, therefore, in a position to deal with all the grounds upon which the petitioner based his application; and, in view both of the importance and the connection, one with another, of the questions raised for our consideration, the course adopted has been the most convenient one.

(1) (1904) I. L. R. 32 Calc. 469.
(2) (1887) I. L. R. 14 Calc. 707, 715.
(3) (1905) I. L. R. 33 Calc. 1.
(4) (1888) I. L. R. 11 Mad. 443.

The only other point to which a reference is necessary is the question of the jurisdiction of this Court to revise the order of the Subordinate Judge. It was contended by the learned Advocate-General that the order in question is made in the exercise of a special statutory jurisdiction and is consequently not an order in a "case" in which this Court can exercise its revisional powers under section 622 of the Civil Procedure Code. In our opinion, there is no foundation for this contention. No doubt, the Civil Court acquires jurisdiction by virtue of the reference made by the Revenue Court; but once the Civil Court has got seisin of the case, it exercises its powers as a Civil Court. It determines the question referred to it and delivers possession accordingly. It does not make a report to the Revenue Court to enable the latter to pass the final orders. Its decision must be taken to be the decision of an ordinary Civil Court, to which it is competent for it to give effect. The mere fact that the exercise of its jurisdiction is initiated by a reference from the Revenue Court does not make the exercise of jurisdiction by it equivalent to an exercise of jurisdiction by the Revenue Court; nor can we legitimately attribute to the proceedings before it the character of a proceeding before a Revenue Court. This is borne out by the provision of section 62 which expressly bars an appeal and a review. Such a restriction would not have been necessary, unless the order of the Civil Court was one which without such bar would be appealable or open to review under the provisions of the Code of Civil Procedure. In this view of the matter, this Court has clearly jurisdiction to interfere either under section 622 of the Code of Civil Procedure or under section 15 of the Charter Act. There can be no question, therefore, as to the competency of this Court to interfere in the exercise of its revisional powers. It was suggested, however, that as the petitioner has her remedy by a regular suit, this Court ought not to interfere. No doubt the ordinary rule is that where an aggrieved party has other remedy available, this Court is unwilling to interfere, but it is unquestionable that even if there be such remedy, this Court may interfere in exceptional cases [*Debi Das* v. *Ejaz Husain* (1)] and upon the facts

(1) (1905) I. L. R. 28 All. 72.

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the "*Jugantar*," and in respect of one of which articles the editor of the "*Jugantar*" had been already convicted. In pursuance of the warrant issued the petitioner was arrested on the 21st August, and the trial began on the 26th. The accused were charged on the 4th September, and the petitioner was convicted on the 23rd. Meanwhile, on the 26th August, the description of the article "India for the Indians" had been corrected to "Politics for Indians," by means of a third sanction of the Government of Bengal filed on that date. All the sanctions were forwarded through the Commissioner of Police, Calcutta, for whose "information and guidance" they were sent by Mr. E. A. Gait, Officiating Chief Secretary to the Government of Bengal, the officer who had signed the sanctions. The wording of these three sanctions is :—"The sanction of Government is hereby accorded to the prosecution under section 124A of the Indian Penal Code of the . . . . Printer . . . . . of the "*Bande Mataram*" newspaper," and so forth. No name was inserted in any of the sanctions, but this omission was supplied by Superintendent Ellis on his application for warrants dated the 17th August. In his deposition, given on the 26th August, Superintendent Ellis said :—"This, shown to me, is the body warrant for the arrest of the accused Apurba. On the 18th August, I endorsed it for execution to Inspector Lahiri. Applications for both these warrants were made after receipt of sanction, and on or about the 17th August." The Superintendent had previously said that he had received the sanctions signed by the Chief Secretary to the Government of Bengal. He also stated in cross-examination :—"I am in charge of this case. I am acting under the directions of the Commissioner of Police. I received verbal instructions from the Commissioner of Police, but no written instructions. I obtained a body warrant. The application for warrant contained no statements, nor did I make any verbal statement on oath. I proceeded against Apurba on the basis of the declaration made by him. I knew of that declaration when I applied for the warrant. I believe, however, that there was some additional evidence known to the Police."

On these facts, the learned counsel for the petitioner has advanced ten contentions, with which we shall deal *seriatim*.

CIVIL RULE.

Before the Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Sharfuddin.

KANTO RAM DAS
v.
GOBARDHAN DAS.*

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Aug. 23.

Prosecution, order for—Criminal Procedure Code (Act V of 1898) s. 476—Indian Penal Code, (Act XLV of 1860) ss 210, 193, 119 and 114—Cognizance in the course of a judicial proceeding—Jurisdiction—Judicial proceedings—Execution proceedings.

The powers conferred by section 476 of the Criminal Procedure Code can only be exercised if the offences in respect of which a prosecution is ordered have come to the cognizance of the Court in a judicial proceeding.

Execution proceedings subsequent to the trial of a suit are not judicial proceedings.

Hara Charan Mookerjee v. Emperor(1), followed. *Begu Singh v. Emperor*(2), *Dharamdas Kamar v. Sagore Santra*(3), and *Emperor v. Molla Fazla Karim*(4), referred to.

KANTO RAM DAS and Sarada Charan Das obtained a decree for rent on the 1st February 1906 against one Gobardhan Das. The decretal amount was paid by Gobardhan through his pleader and a petition certifying full satisfaction was filed in Court. Notwithstanding this, the decree holders applied for execution of their abovementioned rent decree and attached the judgment debtor's lands—all these proceedings taking place before Babu Amrita Nath Mitter, the Munsif of Maulvi Bazar. The land was sold and the sale confirmed by his successor in office. The Sheristadar of the Court bringing these facts to the notice of the Munsif, he held an enquiry and issued notices to the parties. Babu Amrita Nath Mitter then came back to the station and on the 17th June 1907 passed an order under s 476 Criminal Procedure Code directing that Kanta Ram Das and Krishna Charan Das should be tried

* Civil Rule No. 2348 of 1907.

(1) (1905) I. L. R. 32 Cal. 367.
(2) (1907) I. L. R. 34 Cal. 551.
(3) (1906) 11 C. W. N. 119.
(4) (1905) I. L. R. 33 Cal. 193.

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order of Government to institute the complaint." The prosecution of the petitioner was, *mutatis mutandis*, even more regular than the prosecution of Tilak.

But the learned counsel has called our attention to a decision of Pratt and Handley JJ., in the case of *Kali Kinkar Sett* v. *Nritya Gopal Roy* (1), where a Division Bench of this Court ruled that a Presidency Magistrate is not excused by section 200, clause (*b*), of the Criminal Procedure Code, from the necessity of placing on record the necessary evidence of the actual complainant's authority as delegated by the person to whom sanction was actually granted to prosecute certain persons under section 193 of the Indian Penal Code. We think that case is clearly distinguishable from the present, because in the absence of proof of delegation the actual complainant had no *locus standi*, and his complaint might have been negatived by the real complainant coming forward and exercising his own discretion not to proceed in the matter. No such considerations can affect the present case. We may notice in this connection the English case of *Regina* v. *Judd* (2). The learned counsel has argued, on the authority of the observations of Lord Colerdge, C.J., that the petitioner's name should have been mentioned and specified by Government, and that the *fiat*, or order, or sanction initiating his prosecution being defective, in that it merely described him as the printer of the "*Bande Mataram*," the conviction of the petitioner should be quashed. We think it sufficient to say that *Regina* v. *Judd*(2) proceeded on a construction of the English Newspaper Libel Act, and that the law we administer in this country is contained in the Code of Criminal Procedure. We have to construe section 196 of that Code, the terms of which are very different from the English Statute. The petitioner here was indicated from the first. His name was supplied when it was required, *i.e.*, at the commencement of the Police Court proceedings.

The next contention is that the sanctions or notes by Mr. Gait were not really "complaints" within the meaning of section 4(*h*) of the Code. With this we entirely agree. The sanctions were the order or authority by which the prosecution

(1) (1904) I. L. R. 32 Calc. 469. (2) (1888) 37 W. R. 143.

above referred to, except the sale and confirmation of sale took place before Babu Amrita Nath Mitter. But Babu Amrita Nath Mitter was transferred in December 1906, and the sale was held and the order confirming the sale, was passed by his successor, Babu P. N. Roy Chowdhry. Then the acting sheristadar noticed that the decree in execution of which the sale had taken place, had already been satisfied. He brought this to the notice of Babu P. N. Roy Chowdhry on the 1st May 1907. Babu P. N. Roy Chowdhry held an informal enquiry and issued notices to the parties. He called on Kanto Ram, Sarada Charan, and the 2nd petitioner before us, Krishna Charan Das, the son of Kanto Ram, to show cause why they should not be prosecuted, the first two for offences under section 210 and the third for aiding and abetting them. Babu Amrita Nath Mitter then returned to Maulvi Bazar and Babu P. N. Roy Chowdhry was transferred.

No cause was shown by any party. Babu Amrita Nath Mitter then on the 17th June last passed the order complained of

As has been said, Babu Amrita Nath Mitter made a full enquiry into the facts. He discharged Sarada Charan Das who is a minor. He came to the conclusion that the principal offender was Krishna Charan Das who had intentionally caused the decree to be executed for the second time, well knowing that it had already been satisfied. He points out that Krishna Charan Das purposely avoided going to the pleader formerly employed by him, who had received the money, and that he engaged a new pleader to execute the decree for the second time The defence is that the execution of the decree was applied for by mistake and that it was another decree against the same judgment-debtor of which execution should have been applied for, but the Munsif has disbelieved this defence.

The grounds on which the Rule is supported are (i) that according to the ruling of this Court in *Hara Charan Mookerjee* v. *Emperor*(1), Babu Amrita Nath Mitter had no jurisdiction to order the prosecution of the petitioners, as the offences alleged to have been committed by them did not come to his cognizance in the course of a judicial proceeding; (ii) that under the ruling of this Court in *Begu Singh* v. *Emperor*(2), it is only the officer

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on the part of Superintendent Ellis? We think not. It must be presumed that all official acts have been regularly performed, and the presumption of section 114 of the Indian Evidence Act amply supplies any omission, either as to the method of communication of the sanction to Superintendent Ellis, or in the order sheet of the Chief Presidency Magistrate. Moreover, the facts stated by the petitioner in his own application clearly indicate that he was put upon his trial in consequence of the sanctions granted by Government.

There is another subsidiary contention on this part of the case, and that is that the Lieutenant-Governor should have *personally* signed the sanctions under section 196. The contention appears to us puerile. Although the expression "Local Government" means the Lieutenant-Governor, the Head of the Executive Government must necessarily, and ordinarily does, act and communicate his orders through his accredited and gazetted officers.

It is contended, thirdly, that even if Mr. Gait's notes or sanctions be held to be "complaints," the Magistrate should have examined the complainant (Mr. Gait or Superintendent Ellis) as required by law, before issuing process against the petitioner. The argument must fail by reason of the observations we have already made. We do not regard these sanctions as "complaints;" they merely authorized Superintendent Ellis to make the complaint which we have found that he did make.

The fourth contention is that Exhibits 3 and 4 were wrongly considered to be supplementary complaints, and that the petitioner could not be properly tried on them after they had been placed before the Court. This contention refers to the correction of the name of the article headed "Politics for Indians." The first citation of the article, viz., "India for the Indians," was merely a misdescription. There was no such article in the "*Bande Mataram*" of the date indicated, but there was an article, or letter, headed "Politics for Indians," and the trial commenced, proceeded, and ended in respect of that article. The petitioner was in no way prejudiced, as he knew what case he had to meet. The defect, if any, is cured by the provisions of section 537 of the Criminal Procedure Code.

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re-publication was one made *bonâ fide* of the proceedings of a Court of Justice. The protection afforded by the fourth Exception to section 499 of the Indian Penal Code is invoked. That Exception provides that it is not defamation to publish a substantially true report of the proceedings of a Court of Justice. But did the "*Jugantar*" articles form part of the proceedings of a Court of Justice? They did not. The conviction for sedition in the "*Jugantar*" case was based on one article only. The prosecution intended to rely in support of their case upon other articles published in that paper. These other articles were translated and communicated to the accused for his sole benefit. They were, however, never used, and were never brought upon, or formed part of the record in the "*Jugantar*" case. There was, therefore, no excuse for the wholesale publication in the "*Bande Mataram*" of these translations, and the head-note is inaccurate and misleading. The publication cannot, therefore, be justified on the ground put forward by the petitioner. It was not, indeed it could not be, contended that these articles were not seditious. In a question of this kind we have to take into consideration the state of the contry and the object with which the re-publication was made. It is admitted that the country was at the time in a state of unrest. That being so, it was mischievous to add fuel to the flame of disquiet. There is no reason to believe, and we have not been told, that the "*Jugantar*" articles were communicated to the readers of "*Bande Mataram*" for any useful or proper purpose. The communication of seditious articles to another, and possibly larger, and certainly more educated, class of readers tended to increase and continue the mischief which had been checked by the criminal prosecution of the "*Jugantar*" The dissemination of temptation is not excusable on any principle with which we are conversant.

The eighth contention is that the petitioner is imperfectly acquainted with the English language, and that he merely acted under orders. We shall consider this matter when we come to the question of sentence.

Ninthly, it is argued that the petitioner merely subscribed to the declaration required by the Printing Presses and Newspapers Act (XXV of 1867), and that, in the absence of evidence to show

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lays down that execution proceedings subsequent to the trial of a suit are not judicial proceedings. On this ruling, it must be held that the Munsif, Babu A. N. Mitter, had no jurisdiction to order the prosecution of the accused under section 476, and on this ground the Rule must be made absolute.

This result is to be regretted; for there appears every reason to believe that the processes of the Civil Court have in this instance been abused, and that offences against justice have been committed. No doubt the judgment-debtor, Gobardhan Das, can institute a prosecution, but he is not likely to do so, for the Munsif says that he now appears to have been gained over by the other side.

We make the Rule absolute and set aside the order of the Munsif referred to, dated 17th June 1907.

Rule absolute.

S. M.

TESTAMENTARY JURISDICTION.

Before Mr. Justice Chitty.

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Nov. 18.

In the Goods of MANICK LAL SEAL.*

Probate, application for—Official Trustee—Executor—Renunciation—Retraction—Probate and Administration Act (V of 1881) s. 17.

Where the Official Trustee expressed his intention of renouncing probate but subsequently retracted :—

Held, that no formal renunciation having been made, he was not precluded from applying for probate.

In the Goods of Robert Morant(1) and *Golap Sundari Dassi*(2) followed.

Held, also, that there was nothing under the Official Trustee's Act which precluded the Official Trustee from being appointed an executor and acting as such.

This was an application by the Official Trustee for Probate of the will of one Manick Lal Seal deceased upon the following facts :—

Manick Lal Seal died on the 12th September 1907 leaving him surviving his widow, Srimati Kumudini Dasi, and a minor son, Monohar Lal Seal. By his will the deceased desired that the Court of Wards should take charge of his property, but that should they fail to do so then the Official Trustee was to manage the properties. Shortly after the death of Manick Lal Seal, the Administrator General applied for probate before Mr. Justice Chitty, the Vacation Judge, as it was not clear whether the Court of Wards would take charge of the property, and it was doubtful whether the Official Trustee would take over charge.

The Official Trustee who had expressed his intention of renouncing probate, withdrew his renunciation on this application, and the matter was adjourned till after the vacation, when the Official Trustee brought the present application for probate.

* Testamentary and Intestate Jurisdiction.

(1) (1874) L. R. 3 P. & D. 151. (2) (1901) 5 C. W. N. (Notes) clv.

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oppression, &c. It is also urged that the evidence is the outcome of party feeling.

"The trying Magistrate has made a very careful record of the evidence and written a well considered judgment. There is a mass of evidence on the record to show that all these accused form a gang and are supported by one Nilkamal, a wealthy man, whom they consult and visit. This being the case, it is clear that resorting with men of bad character, old convicts, is an integral portion of the charge and they are no more prejudiced by that than they are by being charged separately with bad livelihood.

"Admittedly, the police took up this case after their failure to detect the dacoity case, but there were indications in that case that it was the work of this gang, and their action was, therefore, proper. That this case was the outcome of the Inspector's revenge is absurd, unless it be believed that the Inspector also managed to getover sixty other witnesses to support his animosity, and these were witnesses from some eighteen different villages

"As to the party feeling, there seems to have been some feeling between Hindus and Mussalmans regarding water-supply, but the accused were both Hindus and Mussalmans, as also the witnesses

"I consider the order to find security justified, and reject the appeal. Appellants will be committed to jail in default of finding security."

Babu Dasharathi Sanyal, for the petitioners. The judgment of the Appellate Court is not in accordance with law. Section 424 of the Criminal Procedure Code, read with s. 367, lays down what the Appellate Court's judgment should contain The District Magistrate has not referred to a single accused by name, and there is nothing in the judgment to show that he considered the case against each accused separately, or what the evidence against each accused was.

CASPERSZ AND CHITTY JJ. This is a Rule on the District Magistrate of Midnapore to show cause why he should not be directed to re-hear the appeal in the matter of the securit demanded from the petitioners to be of good behaviour, and to consider the case of each petitioner on the evidence on the record.

The appellate judgment of the learned District Magistrate is not in compliance with the law and the authorities on the subject. He was dealing with the case of seventeen persons and the evidence of seventy witnesses for the prosecution and fifty-four for the defence. This mass of evidence he disposes of in, what we may call, a very stereotyped manner. The name of not

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MANICK LAL SEAL, IN THE GOODS OF.

Under these circumstances I propose to make a grant to the Official Trustee as prayed, and probate will accordingly issue to him.

Attorneys for the Official Trustee: *B. N. Basu & Co.*

Attorneys for the Administrator General: *Morgan & Co.*

Attorneys for Srimati Kumudini Dasi: *Ghose & Bose.*

Attorneys for the Court of Wards: *Sanderson & Co.*

R. G. M.

Before Mr. Justice Casperz and Mr. Justice Chitty.

APURBA KRISHNA BOSE
v.
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Nov. 12.

Sedition—Government authority for prosecution—Sufficiency of authority—Complaint—Regularity of proceedings—Criminal Procedure Code (Act V of 1898) ss 4(h), 196, 200—Presumption of regularity of official acts—Evidence Act (I of 1872) s. 114—Re-publication of seditious articles—Penal Code (Act XLV of 1860) ss. 124A, 499, Exception (4)—Printer, liability of—Act XXV of 1867, s 7.

Orders under s. 196 of the Criminal Procedure Code should be expressed with, sufficient particularity and with strict adherence to the language of the section. But the real question in such cases is whether the prosecution was instituted under the authority of Government.

An order purported to accord sanction to prosecute the editor, manager and the printer of a newspaper under s. 124A of the Indian Penal Code without specifying their names, and containing a misdescription of the seditious article. A police officer received it from the Commissioner of Police, and under his directions applied for and obtained warrants from the Chief Presidency Magistrate against the accused. He was examined by the Magistrate, but not on oath, and his deposition was not recorded. On the day of the trial the same police officer filed an amended order under s 196 of the Criminal Procedure Code correcting the error in the name of the article in the previous orders:

Held, (i) that the prosecution was regularly instituted.

Queen-Empress v. *Bal Gangadhar Tilak*(1) referred to.

Kali Kinkur Sett v. *Nritya Gopal Roy*(2) and *Reg.* v. *Judd*(3) distinguished.

(ii) that the order under s. 196 of the Criminal Procedure Code was not a "complaint" within s. 4(h), but that the application of the police officer for warrants in respect of an offence under s. 124A of the Indian Penal Code, coupled with his oral allegations, though not made on oath nor recorded, amounted to a "complaint."

Queen-Empress v. *Sham Lall*(4) followed.

(iii) That the presumption under s. 114 of the Evidence Act supplied any omissions either as to the method of the communication of the order to the prosecuting officer, or in the order-sheet of the Magistrate.

(iv) That the article in question was incompatible with the continuance of the Government established by law, and was seditious. It is the duty of every citizen

* Criminal Revision No. 1176 of 1907 against the order of D. H. Kingsford, Chief Presidency Magistrate of Calcutta, dated Sept. 23, 1907.

(1) (1897) I. L. R. 22 Bom. 112.
(2) (1904) I. L. R. 32 Calc. 469.
(3) (1888) 37 W. R. 143.
(4) (1887) I. L. R. 14 Calc. 707.

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the question "Do you know the paper "*Bande Mataram?*" to which he replied "I decline to answer this question." He was then asked "Do you decline to answer any question in this case?" and he said "I do." The petitioner was then bound down to appear the next day, but the case was not taken up till the 29th idem when he was again asked to take the oath or affirmation and to answer questions as a witness, and he again declined to do either. The Chief Presidency Magistrate, thereupon, drew up a proceeding under section 482 of the Criminal Procedure Code against him and sent him for trial before the Third Presidency Magistrate for "an offence under s. 178 and s. 179 I. P. C." The latter took up the case on the 10th September and framed two heads of charges.

The first charge stated that the petitioner "had on the 26th and 29th August refused to bind himself by taking an oath or affirmation or to answer any question put to him as a witness, and that he had thereby committed offences under s. 178 of the Indian Penal Code." The other alleged that he "had on the same dates refused to answer questions put to him thereby committing offences under s. 179 of the Indian Penal Code."

The prisoner then made a statement that he had conscientious scruples to take any part in the prosecution, and that he had therefore refused to be sworn or affirmed in the case. The Magistrate examined one witness, heard both parties, and convicted him of an offence under s. 178 of the Indian Penal Code committed on the 26th, and under ss. 178 and 179 of the same Code of offences committed on the 29th, acquitting him of an offence under s. 179 on the former date. The petitioner was sentenced to six months' simple imprisonment for each offence, but the sentences were made concurrent.

Mr. C. R. Dass (*Babu Sarat Chunder Sen* with him), for the petitioner. The trial is invalid for misjoinder of charges. The offences of the 26th August were completed on that day, and were distinct from the offences committed on the 29th. The joinder of offences under ss. 178 and 179 of the Indian Penal Code was in contravention of s. 234 of the Criminal Procedure Code and rendered the trial bad: *Subrahmania Ayyar* v.

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The three accused were also charged with having re-produced in the issue of the 26th July 1907 of the same paper the official translations of certain seditious articles which had originally appeared in the "*Jugantar.*" This re-publication was headed "The *Jugantar* case. The articles on which action was taken." It appeared that translations of all the seditious articles which had appeared in the "*Jugantar*" made by the Bengali Translator to Government for the prosecution of the editor had been given to the defence pleader, but the prosecution only elected to proceed on one of the articles which alone was exhibited in the case.

By a notification, dated the 3rd June 1907, which appeared in the *Gazette of India* of the 8th June 1907, at p. 443, the Viceroy-in-Council empowered Local Governments to institute proceedings for sedition, in consultation with their legal advisers, in all cases where the law had been wilfully infringed.

On the 30th July 1907 two orders under s. 196 of the Criminal Procedure Code were issued in these terms:—

"The sanction of Government is hereby accorded to the prosecution, under s. 124A of the I. P. C., of the editor of the "*Bande Mataram*" newspaper, for publishing in the *dâk* edition of the 28th June a letter entitled "India for the Indians" the contents of which are seditious.

E. A. Gait,
Chief Secy. to the Govt. of Bengal.

"The sanction of Government is hereby accorded to the prosecution, under s. 124A of the I. P. C., of the editor of the "*Bande Mataram*" for re-publishing in his issue of the 26th July certain seditious articles that originally appeared in the "*Jugantar,*" and for one of which (the dispelling of fear) the editor of that paper has been already prosecuted and convicted.

E. A. Gait,
Chief Secy. to the Govt. of Bengal."

On the same day Superintendent Ellis, of the Detective Department, applied to the Chief Presidency Magistrate for a warrant against the alleged editor of the "*Bande Mataram,*" Arabindo Ghose, under the verbal directions of the Commissioner of Police, in these terms:—

"Emperor *v.* Arabindo Ghose.

In the above case I beg to apply for a warrant of arrest against the accused above-named, charged under s. 124A of the Indian Penal Code.

The 30th July 1907.

M. B. Ellis,
Superintendent, C. C. I. D."

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again declined to do either. The Chief Presidency Magistrate, before whom the petitioner had appeared as a witness, then recorded the facts, and sanctioned and directed his prosecution before the Third Presidency Magistrate. On the 4th September, at the request of the petitioner's counsel, the case was postponed to the 10th September. On the 10th September the petitioner was convicted of three offences under sections 178, 179 and 178 of the Penal Code and sentenced as already mentioned.

The first objection urged by the learned counsel for the petitioner is that the trial was illegal as there was misjoinder of charges. He relies on the case of *Subrahmania Ayyar* v. *King-Emperor* (1). But the decision of their Lordships of the Privy Council in that case can have no application to the present. The trial in the present case was a summary one under the special procedure provided for Presidency Magistrates' Courts. No charge sheet was required to be drawn up. Furthermore, there was no trial in the sense of an investigation of facts, for the facts were all admitted by the petitioner. The petitioner can have in no way been prejudiced by charges with two heads, in each of which he was charged with committing offences under sections 178 and 179, being drawn up. He was convicted of only three offences, two of which are of the same kind. The provisions of section 234 have, therefore, not been contravened. He has been sentenced to practically one punishment for all three offences.

Then the learned counsel for the petitioner impugns the correctness of the order of the Chief Presidency Magistrate sanctioning and directing his prosecution before the Third Presidency Magistrate. In particular it is objected that the Chief Presidency Magistrate directed his prosecution for "an offence under sections 178 and 179" which, it is said, would not justify his prosecution for two offences under section 178, and one under section 179. An offence under section 178 is quite distinct from one under section 179. The Chief Presidency Magistrate could not have meant, as the learned counsel contends he did, that the petitioner should be prosecuted for only one offence, *i.e.*, that the prosecution should be either under section 178 or section 179. The Chief Presidency Magistrate

(1) (1901) I.L.R. 25 Mad. 61.

manager, and the conviction of the petitioner who was sentenced to three months' rigorous imprisonment. He then moved the High Court and obtained the present Rule, the grounds of which are set forth in the judgment of the High Court.

Mr. A. N. Chaudhuri, (*Babu Nagendra Kumar Bose* and *Babu Monmotho Mukerjee* with him), for the petitioner. The sanctions under s. 196 of the Code are bad as being vague and indefinite: *Queen-Empress* v. *Bal Gangadhar Tilak*(1). The name of the authorized complainant should have been mentioned in it. There is nothing to show that Superintendent Ellis had authority to complain: see *Baperam Surma* v. *Gouri Nath Dutt*(2). The accused should have been named: *Reg.* v. *Judd*(3). Then sanction was originally given in respect of the article entitled: "India for Indians," and not for "Politics for Indians," which was the subject of the charge. The sanction should have been signed by the Lieutenant-Governor. There was no complaint by Ellis, but only an application for a warrant The order or sanction under s. 196 is not a complaint. There is nothing to show that Superintendent Ellis was examined as required by law. There is no evidence of his authority to complain: see *Kali Kinkur Sett* v. *Nritya Gopal Roy*(4). These arguments apply to grounds Nos. 1—3 of the Rule As to the fourth ground, the bad sanctions could not be validated afterwards. The next ground is already covered by my arguments. As to the sixth ground, the article is not seditious. Then the re-publication is justified by Exception (4) to s. 499 of the Penal Code The last grounds are that the printer was imperfectly acquainted with English, and that he is not liable as a mere printer.

Mr. Bogram (instructed by *Mr. Hume*), for the Crown. The order is not defective. Section 196 does not contemplate a *sanction* as s. 195 does. The only question is whether the orders in the case amounted to a giving of authority to complain within the terms of s. 196. If the Court is satisfied that it was, nothing more is required. The signature of the Lieutenant-Governor is not necessary, nor need the accused be named: see s. 195(4),

(1) (1897) I. L. R. 22 Bom. 112.
(2) (1892) I. L. R. 20 Calc. 474, 475.
(3) (1859) 37 W. R. 143.
(4) (1904) I. L. R. 32 Calc. 469.

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namely, two under section 178 of the Indian Penal Code committed on the 26th and 29th of August last, and one under section 179 of the Indian Penal Code committed on the 29th of that month, and sentenced to six months' simple imprisonment for each of the above offences, the sentences to run concurrently. The petitioner now applies for a revision.

The original case, in which the petitioner was summoned as a witness for the prosecution, was the case of *Emperor* v. *Arabinda Ghose* under section 124A. It appears that one of the dates for the hearing of that case was the 26th of August last. The petitioner on appearing as a witness was required to bind himself by an oath or affirmation to state the truth, but he refused to do so.

The Chief Presidency Magistrate who was trying the original case took a personal recognizance from the petitioner to appear on the following day. The petitioner's case was adjourned on the 27th and 28th of August last, and on his re-appearance on the 29th of August he again refused to bind himself by oath or affirmation. On both the dates he also refused to answer any question with reference to the case in which he was called as a witness.

On the 29th of August the Chief Presidency Magistrate drew up a proceeding against the petitioner requiring him, under section 482 of the Criminal Procedure Code, to appear for trial on the 4th of September before the Third Presidency Magistrate for "an offence under sections 178 and 179 I. P. C."

It appears that the petitioner has admitted all the facts with reference to his refusal to take any part in the prosecution of Arabinda Ghose.

The trying Magistrate has drawn up a charge with two heads, *first*, under section 178 of the Indian Penal Code, regarding offences committed on the 26th and 29th of August last; *second*, under section 179 regarding offences committed on the above dates. The trying Magistrate has acquitted the petitioner with regard to the offence under section 179 of the Indian Penal Code committed on the 26th of August, and has convicted him of the other three offences and sentenced him as above stated.

We have been asked to quash the sentences on the following grounds: (*i*) that there was misjoinder of charges, the provisions

The petitioner, Apurba Krishna Bose, was the printer of a daily newspaper called the "*Bande Mataram*" published in Calcutta, and he was recorded as such under the provisions of the Printing Presses and Newspapers Act (XXV of 1867). He was arrested on a warrant issued by the Chief Presidency Magistrate on the allegation that he had committed the offence of sedition punishable by section 124A of the Indian Penal Code. The following paragraphs of the application recite the facts which are not in controversy :—

"That your petitioner was put upon his trial before the Chief Presidency Magistrate of Calcutta, along with the alleged editor and the manager of the paper, for having published in the town edition of the 27th June 1907, and the corresponding *dàk* edition, of the "*Bande Mataram*" a letter headed "Politics for Indians," and a copy of the official Translator's translation of the articles for which the editor of the "*Jugantar*," a weekly paper, had been found guilty of sedition and convicted under section 124A.

"That at the trial three notes purporting to be signed by the Chief Secretary to the Government of Bengal were put in, so far as regards your petitioner, as the sanction for his prosecution. True copies of these are herewith attached and marked A, B and C.

"That evidence was gone into, and eventually, on the 23rd September 1907, the learned Chief Presidency Magistrate delivered his judgment acquitting the alleged editor and manager, but convicting your petitioner under section 124A of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for three months."

The further particulars, so far as they need be mentioned, and as we gather them from the record, are these. The earlier sanctions of the Government of Bengal, bearing date the 6th August 1907, were filed in the Court of the Chief Presidency Magistrate on the 17th *idem* by Superintendent Ellis, of the Detective Department, who applied for a warrant of arrest against the printer, by name Apurba Krishna Bose, of the "*Bande Mataram*," on a two-fold charge of sedition, namely, for printing an article headed "India for the Indians," and for re-printing certain seditious articles which originally appeared in another newspaper called

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offences under two different sections of the Indian Penal Code on the 26th of August last, and again two distinct offences under two different sections of the Indian Penal Code on the 29th of that month. It is, therefore, clear that the petitioner was not charged for more than three offences *of the same kind*, nor was he tried at one and the same trial for more than three of such offences. Under the above circumstances, the petitioner's case does not fall under section 234 of the Criminal Procedure Code.

The provisions of section 233 are general in nature, requiring that there should be a separate charge and separate trial for every distinct offence, except in the cases mentioned in sections 234, 235, 236 and 239 of the Criminal Procedure Code. I have already observed that section 234 has no application as the offences are not *of the same kind*.

Section 235 of the Criminal Procedure Code relates to the case of a person who, in one series of acts so connected together as to form the same transaction, has committed more than one offence. This section provides that in such a case the accused person may be charged with, and tried at one trial for, every such offence. The transaction here referred to is marked by oneness as to time and place. Illustrations (*a*), (*b*) and (*c*) refer to cases where different offences form parts of one continuous series of acts. In deciding the question whether the acts alleged form parts of the same transaction, the elements for consideration should be the proximity of time and the intention and similarity of action. In the present case there was proximity of time and the intention of the petitioner was clearly to frustrate and impede the administration of justice by refusing to give evidence in the case in which he was called to give evidence. I think that the petitioner's case clearly falls under section 235 of the Criminal Procedure Code. For the above reasons, I am of opinion that there was no misjoinder of charges.

The second objection urged on behalf of the petitioner is that the order of commitment does not specify the offences that are said to have been committed by him. The Chief Presidency Magistrate in his order of commitment says that in his opinion Bipin Chandra Pal had committed "an offence under sections 178-

It is first urged that the trial of the petitioner was wholly bad, as there was no proper sanction for his prosecution as required by section 196 of the Criminal Procedure Code.

Section 196 of the Code enacts that "no Court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code (except section 127), or punishable under section 108A, or section 153A, or section 294A, or section 505 of the same Code, unless upon complaint made by order of, or under authority from, the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council in this behalf." The section does not use the word *sanction*. It contemplates a complaint made by order of, or under authority from the Local Government. The Code differentiates between sanctions and complaints, as, for example, in section 195. The so-called sanctions signed by Mr. Gait were not expressed in exact language, but we do not think that the prosecution of the petitioner was bad for want of proper sanction. He was duly proceeded against, if the provisions of section 196 were substantially complied with.

The section was construed by the Bombay High Court in *Queen-Empress* v. *Bal Gangadhar Tilak* (1). In that case the sanction, to use the convenient word, was expressed in general terms, and did not even specify the seditious articles. Nevertheless, the Court held that "the effect of no such specification being made is to give him (complainant) the widest latitude in selecting the matter to be complained of." We entirely agree with Strachey, J., that orders under section 196 should be expressed with sufficient particularity and, we may add, with strict adherence to the language of the section. But the real question in such a case is whether the prosecution was instituted under the authority of Government. To quote the judgment of the Full Bench, "There is no special mode laid down in the Code whereby the order or sanction of Government is to be conveyed to the officer who puts the law in motion. In this case the prosecution was conducted by the Government solicitor. It was instituted by the Oriental translator to Government, and he produced the written

(1) (1897) I. L. R. 22 Bom. 112.

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The fifth objection is that the petitioner, having once committed an offence under section 178 of the Indian Penal Code, cannot be held to have committed a further offence under section 179 of the Indian Penal Code, as the latter section provides for the case of a witness who being on oath refuses to answer questions relevant to the inquiry. Assuming that this proposition of law is correct, there still remains the petitioner's conviction and sentence under section 178 for his refusal to take the oath on the 29th of August.

The petitioner admits in his written statement that every member of society is bound to help the administration of justice by giving evidence in the interest of social well-being, and also admits having refused to take the oath. He further says in his written statement that his refusal was actuated by the belief that the prosecution was prompted by executive policy. The petitioner appears to be a journalist and a preacher and presumably a man of education. That being so, I do not consider that a sentence of six months' simple imprisonment, even under one section, namely, section 178 of the Indian Penal Code, for his deliberate refusal to take an oath on the 29th of August, is at all excessive. I concur with my learned brother in rejecting this application.

Application refused.

E. H. M.

was started. The complaint, if any, was made by Superintendent Ellis. The definition of "complaint" is "the allegation made orally or in writing to a Magistrate, with view to his taking action." Now, the petitioner himself has admitted in the second paragraph of his application that he was arrested "on the *allegation* that he had committed an offence under section 124A., I. P. C." The facts which we have recited in the earlier part of this judgment can bear no other construction than that Superintendent Ellis made oral allegations against the petitioner. It was not necessary that those allegations should be on oath, or that they should be reduced to writing. We desire to affirm the rule laid down in *Queen-Empress* v. *Sham Lall*(1) where an application by a complainant to have his witnesses summoned and the case tried was regarded as a "complaint." The same rule has been followed in later decisions of this Court. We, therefore, think that the application of Superintendent Ellis, coupled with his oral allegations, through the latter were not on oath, nor reduced to writing, amounted to a "complaint" within the meaning of section 196.

It was argued that because there is no record of Superintendent Ellis' examination, he must be taken to have not been examined. It is, however, clear, from the proceedings and Superintendent Ellis' subsequent examination in Court, that he was examined by the Magistrate at the time that he applied for the warrant, though that examination was not upon oath.

In this connection we should notice a subsidiary argument of the learned Counsel. He urges that the sanction of Government was sanction given in the abstract which, to use the words of Pigot and Hill, JJ., in *Baperam Surma* v. *Gouri Nath Dutt*(2), "may float about the world like a bit of thistledown until it comes in contact with some possible prosecutor." But can it be said that Mr. Gait dispersed these sanctions in empty air, and that Superintendent Ellis intercepted them and used them for prosecuting the printer of the "*Bande Mataram*"? Can it be said that the Commissioner of Police and the Standing Counsel to the Government of India abetted an unwarrantable and illegal action

(1) (1887) I. L. R. 14 Calc. 707. (2) (1893) I. L. R. 20 Calc. 474.

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client, and that the order was completed and served on him on the 8th May 1905. They further contended that the suit was barred by Art. 84 Sch. II of the Limitation Act.

The suit came on for trial before SALE J., and his Lordship, on the 11th April 1906, delivered the following judgment:—

"This is a suit by an attorney to recover the amount of sums due upon various allocaturs. The only question is as to whether this suit is barred to any and what extent by limitation. It appears that the plaintiff acted for the defendant in the partition suit of Poresh Nath Mukerji v. Parbutty Churn Mukerji, and the costs in respect of which the allocaturs were issued were payable under various orders made in that suit. The orders for payment of these costs would not have been enforceable ordinarily until the determination of the suit. It appears however that there was an order made for change of attorney on the 1st May 1902. At that time the attorney for the plaintiff had ceased to act as the attorney for the defendant, and it is contended that time began to run against the claim in the allocaturs from the 1st May 1902.

Article 84 of the Limitation Act provides as follows regarding the date from which the time is to run:—"The date of the termination of the suit or business, or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance."

Primâ facie therefore the time in this case would begin to run from the period the plaintiff's attorney discontinued business on account of the defendant, that is, the time would run from the 1st May 1902. The suit itself was filed, instituted on the 27th May 1905, more than three years from the date of such discontinuance. But then on turning to the order directing the change of attorney and which operated so as to effect a discontinuance of the plaintiff's services, it provides as follows:—

'It is ordered that Babu Kristo Kissore Dey, one of the attorneys of this Court, be appointed the attorney for the said defendants, Makham Lal Mukerjee, Khagendra Nath Mukerji, Kumudindu Mukerji and Mohun Lall Mukerji, in the place and stead of the said Babu Nalin Chandra Gupta, the attorney on record for the said defendants: and it is further ordered that the costs due to the said Babu Nalin Chandra Gupta in this suit, including the costs of, and incidental to, this application (including the fee to counsel), be taxed by the Taxing Officer of this Court as between attorney and client on scale No. 2.'

The result of the latter part of the order is that the plaintiff is unable to enforce his claim as regards costs until the same has been taxed in pursuance of this order.

Now, section 15 of the Limitation Act provides:—"In computing the period of limitation prescribed for any suit the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded."

The effect of the order directing the attorney to have his costs taxed is therefore to stay any suit or proceeding for the purpose of enforcing payment of his

The next ground taken is that the Magistrate acted illegally in proceeding with the trial of the petitioner when he found that there was no authority for proceeding with the trial. As to this, we do not desire to add anything to what we have already said, because, in our opinion, there was no real irregularity depriving the Chief Presidency Magistrate of his jurisdiction over the petitioner.

We pass now to a consideration of the sixth plea that the article "Politics for Indians" is not in any way seditious. We have read that article with attention and, we may say, with indulgence, and we find it impossible to regard it otherwise than as seditious. The definition of sedition given in section 124A of the Indian Penal Code contemplates *hatred or contempt* or *disaffection* towards His Majesty or the Government established by law in British India, and this apart from any intention of the offender. The article is in the form of an unsigned letter, but it does not appear in the correspondence columns. There is no heading or foot-note that the editor does not accept responsibility for the opinions expressed in the letter. The comments in the letter are incompatible with the continuance of the Government established by law. Reading the article, as we have read it, for the first time, we think the comments on the slave trade, the evil genii, and the alternatives of British goods or the sword, and the reference to His Majesty, the King-Emperor, and the tone, generally, of the production, are not within the Explanations to section 124A. Such writings are calculated to bring the Government into hatred and contempt. It may be said that these are words of emotional exaggeration. It may be said that "Politics for Indians" was based on imperfect telegraphic intelligence. But the duty of every citizen is to support the Government established by law, and to express with moderation any disapprobation he may feel of the acts and measures of that Government. If the article were near the line demarcating legitimate comment from seditious utterance, we might feel disposed to give the petitioner the benefit of the doubt, but in our opinion no such reasonable doubt exists.

The seventh contention refers to the re-printing of the official translations of the "*Jugantar*" articles, and it is urged the

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Act governs this case, and further my submission is that unless a solicitor's costs are paid, there is no change of attorney.

MACLEAN, C.J. This is a suit by an attorney for the recovery of his costs; and the only question is whether the suit is barred by the statute of Limitation.

The facts are these: The plaintiff acted as solicitor for the present appellants in a certain suit. On the 1st of May 1902, an order was made in the suit for a change of solicitors; and another gentleman was appointed as solicitor for the appellants in the place of the present plaintiff; and it was ordered that "the costs due to the plaintiff in this suit, including the costs of, and incidental to, the application (including the fee to counsel) be taxed by the Taxing Officer of this Court as between attorney and client on scale No. 2." That was, as I have said, on the 1st of May 1902; the suit was not instituted until the 27th of May 1905. The defendants say that the suit is out of time.

The article of the Indian Limitation Act applicable to the case is admittedly Article 84, which relates to a suit by an attorney or vakil for his costs of a suit or a particular business there being no express agreement as to the time when such costs are to be paid. The period allowed is three years, and the time from which the period begins to run is the date of the termination of the suit or business or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance. It is conceded that that Article applies, and that in the face of that Article, the suit, upon the facts stated, would be barred, unless there is some exception which takes the case out of that article. It is said that the case falls within section 15 of the Limitation Act; and this was the view taken by the learned Judge of the Court of first instance. That section runs as follows:—"In computing the period of limitation prescribed for any suit, the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded." The learned Judge considered that this order, which is a common order for taxation

that he was cognizant of what he was printing and publishing, he cannot be liable for the publication of the "*Bande Mataram.*" This contention cannot prevail in view of the legal presumption embodied in section 7 of the Act, and in the absence of any evidence to the contrary. The learned counsel has called our attention to the diversity of the provisions contained in Act XXV of 1867, and we are disposed to agree with him that forty years ago it was never anticipated that a mere printer would be punished, with the aid of the Act, for the publication of seditious matter. It is unfortunate that the person or persons really responsible for these seditious utterances remain undetected. But our duty is to apply the law. It may be observed that if, in consequence of the post of printer being found to be a dangerous or invidious one, the real authors of sedition are unable to get their writings printed, the present law will indirectly succeed in checking sedition, though it is evident that if the law cannot also reach the more guilty persons, it should be, and we have little doubt that it will be, amended

Lastly, on the question of sentence, we pointed out to Mr. Chaudhuri that section 124A provides the punishment of transportation for life or imprisonment for three years with fine. We agree with him that the petitioner should not be severely punished, but we cannot regard a sentence of three months' imprisonment as other than lenient. To reduce it any further would destroy the responsibility and the salutary dread of punishment which should be inculcated. The Rule is discharged.

Rule discharged.

E. H. M.

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apparently had in mind s. 36 of the Bengal Tenancy Act. Th section however does not apply to a case of increase of rent increase of area, and only provides for *gradual* enhancemen Section 52 is imperative.

Babu Nagendranath Ghosh, for the respondent, conced that s. 108 had no application to the present case, but submitt that the tenants took objections upon the landlords' applicati for settlement of rent, and that the question of the correctness the entries arose upon such objections. Under s. 107, a proceedin for settlement of rent under s. 105 is a judicial proceeding, an it is open to the tenants in such a proceeding to raise any questio which they might legitimately raise in a suit instituted for th same purpose.

[MACLEAN, C. J., drew attention to s. 105, cl. (2).]

This clause does not override or go beyond the provisions o s. 103B. I am entitled to prove that an entry is incorrect in proceeding by the landlord under s. 105 as in any other.

[MACLEAN C. J. You should have done so when the draf records were being published or within the month allowed to you after the draft publication. You had also the right to institut a suit under s. 106 within three months after the final publication You, however, did not avail yourself of any of these opportunities.]

The omission on the part of the tenant to contest the proceedings before the Settlement Officer or to institute a suit under s. 106 does not confer greater authority on the entry than is given to it by s. 103B. It is open to me to prove that the entry is incorrect, in any subsequent judicial proceeding in which the entry is relied upon.

On the second point, s. 109A, cl. (3) precludes a second appeal against the decision of the Settlement Officer on the amount of rent.

Babu Sorat Chandra Roy Chowdhury, in reply.

Babu Nagendranath Ghosh, for the appellant (in S. A. No. 1081). The decision that the tenants were settled raiyats is based on an erroneous reading of s. 115 of the Act. Under s. 50, presumption should have been made in favour of the tenants that they were tenants at fixed rates from the fact that they were holding lands at the same rent for over twenty years

Mr. Graham, for the Official Trustee. My application is for probate of the will of the deceased Manick Lal Seal. I understand the Court of Wards will not oppose.

Mr. Sowton, Attorney for the Court of Wards. I do not oppose the application.

Babu Manohar Lall Seal, Attorney for the Administrator General. My submission is that the Official Trustee having renounced probate cannot act as executor: see section 17 of the Probate and Administration Act, and *Ganjessar Koer* v. *The Collector of Patna*(1).

Mr. Chakravarti, for Srimati Kumudini Dasi. I have filed a caveat.

Mr. Graham. As regards renunciation, I submit, the following cases are in my favour: *In the Goods of Golap Sundari Dassi*(2), *In the Goods of Gills*(3), *In the Goods of Robert Morant*(4); see, also, Williams on Executors (10th edition) pp. 158, 159; and the Probate and Administration Act (V of 1881) s. 17.

Mr. Chakravarti. If the grant is to be made to the Official Trustee, I will withdraw my caveat; if not, I must stand on my rights. It will save an enormous amount of expense if the grant is made to the Official Trustee, and will certainly be for the benefit of the estate. Unless the renouncement is recorded it is open to the Official Trustee to withdraw it.

CHITTY J. Manick Lal Seal, who died on the 12th September last, by his will dated the 7th June 1907 desired that the Court of Wards should take charge of his estate and carry out the provisions of his will. If the Court of Wards did not (and only if it did not), do so then he desired that the official Trustee of Bengal should do so and he appointed such Official Trustee Executor of that, his will, or failing him the Administrator General of Bengal.

Immediately after the testator's death the matter came before me as Vacation Judge. It was not then clear whether the Court

(1) (1898) I. L. R. 25 Calc. 795.
(2) (1901) 5. C. W. N. (Notes) clv.
(3) (1873) L. R. 3 P. & D. 113.
(4) (1874) L. R. 3 P. & D. 151.

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MACLEAN C.J.

relating to *mal* lands. The Special Judge has held that section 108 of the Bengal Tenancy Act gives the Settlement Officer power to alter these entries. That section provides that a Revenue Officer . . . . " may on application or of his own motion within twelve months from the making of any order or decision under section 105, section 106, or section 107 revise the same." It seems clear to us that the entry as to *mal* lands was not made under any of the sections mentioned. Section 105 refers to the settlement of fair and equitable rents. Section 106 relates to the decision of disputes regarding entries in the record-of-rights. These disputes can only be decided by the presentation of a plaint on stamped paper. No such plaint had been presented, nor had the Settlement Officer professed to settle any such dispute under section 106. Section 107 merely refers to the procedure to be adopted under the two preceding sections, and directs the Revenue Officer to make in the record-of-rights a note of all rents settled under section 105 and of all decisions of disputes passed under section 106. It appears to us, therefore, that section 108 did not warrant the Settlement Officer in revising his entries as to *mal* lands in the record-of-rights. The Act gives to tenants ample opportunity for the correction of mistakes in that record. The draft record is prepared in the presence of landlord and tenant. The draft is then published, and objections to any entries therein are invited and considered before it is finally published. A still further opportunity is afforded even after final publication by section 106, which allows the parties to institute before the Revenue Officer a suit for the decision of any dispute regarding the entries. In the present case the tenants made no objection to the draft record, nor did they after final publication institute any suit regarding the *mal* lands. The Settlement Officer had no authority to revise the entries regarding *mal* lands in the record-of-rights, and his orders on this point must be set aside.

Another objection taken in the landlord's appeal is in regard to the limitation of enhancement of rent imposed by the Settlement Officer who has directed that the rents shall not be enhanced so as to be in excess of one and a half times the existing ren·. It is urged that such a limitation is inequitable in cases where the

CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

BIPIN CHANDRA PAL
v.
EMPEROR.*

1907
Nov. 20.

Misjoinder of charges—Distinct offences on different dates during same trial—Presidency Magistrates—Refusal to take oath or answer questions—Criminal Procedure Code (Act V of 1898) ss. 233, 234, 235, 482—Penal Code (Act XLV of 1860) ss. 178 and 179.

Where the accused was charged under two heads, *first*, with offences under s. 178 of the Penal Code committed on the 26th and the 29th August respectively; and, *secondly*, with offences under s. 179 of the Penal Code committed on the above dates during the course of the same trial:—

Held per RAMPINI J., that the trial was under the special procedure provided for Presidency Magistrates, that no charge sheet was required to be drawn up, that there was no trial in the sense of an investigation of the facts, that the petitioner had been convicted only of three offences, two of which were of the same kind, and that s. 234 of the Criminal Procedure Code had not been contravened.

Subrahmania Ayyar v. *King-Emperor*(1) distinguished.

Held, further, that a Court acting under s. 482 of the Criminal Procedure Code is not bound to take proceedings on the same day, as it is when acting under s. 480.

Per SHARFUDDIN J., that the accused was not charged with, nor tried at one and the same trial for more than three offences of the same kind, and that s. 234 did not, therefore, apply, but that the case fell within s. 235, and that there was, therefore, no misjoinder of charges.

ON the 26th August, 1907, during the trial of *Emperor* v. *Arabinda Ghose* and others before the Chief Presidency Magistrate for the offence of sedition published in the "*Bande Mataram*," the petitioner was called as the seventh prosecution witness. On going into the witness box he said to the Magistrate "I refuse to take any oath or solemn affirmation. I have been subpœnaed to give evidence in this case." The Magistrate then put him

* Criminal Revision No 1279 of 1907, against the order of Ram Anugraha Narain Sing, Third Presidency Magistrate of Calcutta, dated Sept. 10, 1907.

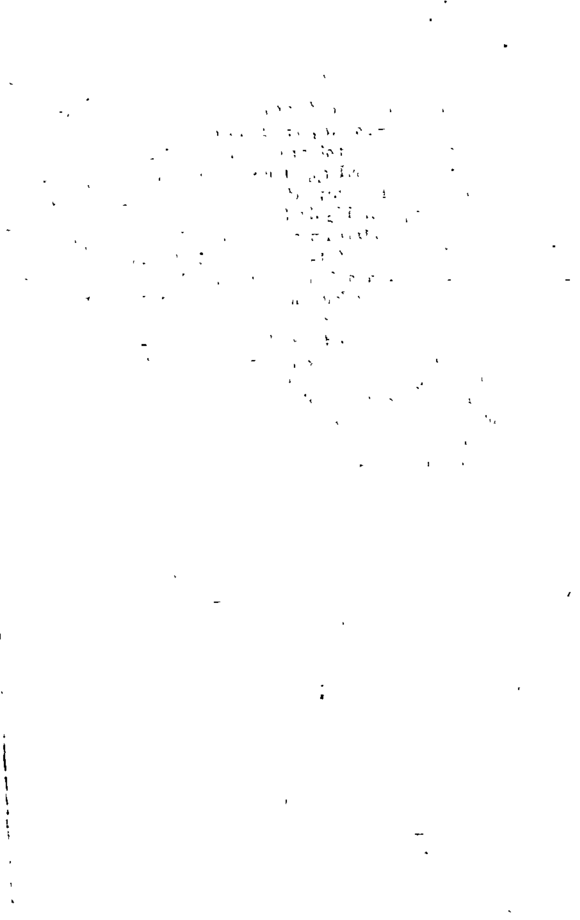
(1) (1901) I. L. R. 25 Mad 61.

King-Emperor(1). Next, the commitment was illegal. The Magistrate could not on the second day take action in respect of the offences of the first day. The proceedings in respect of the latter should have been drawn up on the same day. The commitment is bad also for want of specification of the offence committed. The Magistrate says "an offence;" he intended only *one* offence, that is, either under s. 178 or s. 179 of the Indian Penal Code. Then on the 29th August the position of the petitioner, if he had committed any offence on the 26th, was that of an accused, and he could not be called upon to take any oath or to be affirmed. Further, s. 179 of the Indian Penal Code only applies where a person who is on oath refuses to answer questions.

RAMPINI, J. The petitioner, Bipin Chandra Pal, was convicted on the 10th September last of three offences under sections 178 and 179 of the Penal Code, and sentenced to three terms of six months' simple imprisonment, the sentences to run concurrently. The present application for revision was presented to the Vacation Bench on Monday, the 4th instant. Mr. Das appeared on the 11th instant in support of it.

Mr. Das contends (*i*) that the conviction of his client is illegal on the following grounds: (*a*) that there was misjoinder of charges, (*b*) that the commitment order was illegal, and (*c*) that it contained no specification of the offences alleged to have been committed; (*ii*) that the offences are alleged to have been committed on the 26th and 29th August, and the commitment order was not drawn up until the latter date: and (*iii*) that the petitioner was an accused on the 29th August, and so should not have been required to take an oath. The facts are that the petitioner was called as a witness for the prosecution in the case of *Emperor* v. *Arabinda Ghose* under section 124A. On the 26th August last he was put into the witness-box, but he declined to take the oath or to answer any questions put to him with regard to the case. He was then required to execute a personal recognizance of Rs. 50 to appear again. On the 29th August he was again called on to take the oath and answer questions, but he

(1) (1901) I. L. R. 25 Mad. 61.



no doubt meant that the petitioner should be prosecuted. for an offence under section 178 and for an offence under section 179. But in any case the petitioner has been in no way prejudiced, for he has been sentenced to undergo only one period of simple imprisonment, to which he was liable for one offence under section 178 or section 179. There is no question as to the facts for, on his own showing and that of his learned counsel, he clearly committed offences under sections 178 and 179.

The learned counsel's next contention is that the Magistrate should have recorded the facts and passed the order of commitment on the 26th August, and that he had no right to abstain from passing orders on the 26th August and to recall the petitioner on the 29th August and again call on him to take the oath and give evidence. The Chief Presidency Magistrate proceeded under section 482 of the Criminal Procedure Code. There is no provision in this section, as there is in section 480, that he should take proceedings the same day as that on which the offence is committed. The Magistrate's procedure in postponing orders to the 29th August was no doubt prompted by a humane desire to give the petitioner a *locus penitentiæ* and an opportunity of purging himself of his contempt, and not by any wish to lead the petitioner into committing further offences.

The learned counsel's next contention is that on the 29th August the petitioner was an accused and no oath should have been required of him. But he was called on to take an oath as a witness and not as an accused. No oath was required of him as an accused.

The last question that arises is as to the sentence. The petitioner has practically been sentenced to only six months' simple imprisonment. Considering the nature of the case in which the petitioner was called on to give evidence and of the deliberate character of the attempt made by him to frustrate and impede the administration of justice, I do not consider the sentence too severe. The application is rejected.

SHARFUDDIN, J. The petitioner in the present case is one Bipin Chandra Pal. He was convicted by the Third Presidency Magistrate, on the 10th of September last, of three offences,

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of section 234 of the Criminal Procedure Code having been contravened; (*ii*) that the order of commitment was not in accordance with law, inasmuch as the said order does not specify the offences that are said to have been committed; (*iii*) that the offences having been committed on the 26th and 29th of August, the trying Magistrate was wrong in drawing up any proceeding on the 29th of August with reference to the offences committed on the 26th of that month; (*iv*) that from the 26th of August the position of the petitioner being that of an accused, the lower Court was wrong in requiring him on the 29th of August to bind himself by oath or affirmation; (*v*) that the petitioner, having once committed an offence under section 178 of the Indian Penal Code cannot be held to have committed a further offence under section 179 of the Indian Penal Code, as the section provides for the case of a witness who, being on oath, refuses to answer any question relevant to the inquiry.

The Third Presidency Magistrate has sentenced the petitioner practically to only one punishment of six months' simple imprisonment for all the three offences and, under the circumstances, in accordance with the special procedure, it was not necessary for him to draw up any charge sheet at all. It is urged that the provisions of section 234 of the Criminal Procedure Code have been contravened inasmuch as the petitioner has been charged with, and tried at one trial for more than three offences.

What appears to have been forbidden under the provisions of section 234 of the Criminal Procedure Code is that when a person is accused of more offences than one *of the same kind* committed within the space of twelve months from first to the last of such offences, he ought not to be charged with, and tried at one trial for, more than three of such offences. Clause (2) of that section provides that offences are *of the same kind* when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law. Before the application of the provisions of section 234 of the Criminal Procedure Code to the petitioner's case we have to find out whether all the requirements of this section are present in his case; for, if they are not so this section can have no application. The petitioner was charged for having committed two distinct

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and 179 I. P. C." An attempt is now made to take advantage of the expression "an offence." It is urged that the petitioner was committed for trial for having committed only one offence. From the wording and general tenor of the commitment order it is clear that the order of commitment related to offences under sections 178 and 179 of the Indian Penal Code, and not to any one offence as urged.

The third objection is that the commitment order, dated the 29th of August, ought not to have referred to the offences committed on the 26th of that month. It is contended that section 482 of the Criminal Procedure Code ought to be read with the two previous sections and, as no proceeding was drawn up on the 26th of August, the Chief Presidency Magistrate had no power to draw up a proceeding on the 29th of August with reference to what had happened on the 26th of that month. Assuming that section 482 of the Criminal Procedure Code required the proceeding to be drawn up on the day the offences were committed, this objection is of no avail to the petitioner inasmuch as the proceeding of the 29th of August related also as to what had happened on that date. The petitioner has been convicted under sections 178 and 179 of the Indian Penal Code for offences committed on the 29th of August and for each of these offences, he has been sentenced to six months' simple imprisonment to run concurrently. If the conviction and sentence under section 178 of the Indian Penal Code for the offence committed on the 26th of August cannot stand on the above ground, the other sentences remain as they are.

The fourth objection is that the petitioner was an accused on the 29th of August, and the Chief Presidency Magistrate was wrong in recalling him on the 29th and directing him to take an oath and answer questions put to him. There is no doubt that the petitioner was an accused party in his own case, *i.e*, in the case of *Emperor* v. *Bipin Chandra Pal*, but his position as an accused in his own case did not affect his position as a witness in the case of *Emperor* v. *Arabinda Ghose*. There is no law that disqualifies an accused party from giving evidence in a case in which he is simply called as a witness and himself is not an accused.

III.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

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Act II of 1908 (Tariff)	In Urdu	0	0	3	[1a.]
Act IV of 1908 (Explosives Substances) ...	In Urdu	0	3	0	[1a.]
Act VII of 1908 (Prevention of Excitement to murder in Newspapers)	In Urdu	0	0	3	[1a.]
	In Hindi	0	0	3	[1a.]

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Fletcher.

1907
Nov. 21.

MAKHAM LAL MUKERJEE
v.
NALIN CHANDRA GUPTA.*

Attorney and Client—Solicitor's costs, suit for—Limitation—Order for taxation—Limitation Act (XV of 1877), s. 15, Sch. II, Art. 84—Practice.

An order for taxation of a solicitor's costs does not, under s 15 of the Limitation Act, stay the institution of any suit by him for his costs. Art. 84, Sch II of the Limitation Act is applicable to such a case.

Per HARINGTON, J. An order for taxation can only affect the right to institute a suit if it relates to something which is a condition precedent to the bringing of a suit.

APPEAL by the defendants, Makham Lal Mukerjee and Khagendra Nath Mukerji, from the judgment of SALE, J.

The plaintiff, Nalin Chandra Gupta an attorney of the High Court, instituted a suit on the 27th May 1905 for the recovery of his costs amounting to Rs. 5,955-14. He acted for the defendants, Makham Lal and Khagendra Nath, in a suit instituted in 1899 until the 1st May 1902, when by an order of that date one Krishna Kishore Dey was appointed attorney for the defendants in his place, and the Court directed that Nalin Chandra Gupta's costs should be taxed. The amount due by the defendants to the plaintiff, Nalin Chandra, amounted to Rs. 5,955-14, and the plaintiff demanded payment of this sum from the defendants who neglected to pay the amount demanded, whereupon the plaintiff instituted a suit against them for recovery of his bill of costs.

The defendants at the hearing of the suit contended that the order of the 1st May 1902 was made without direction for payment of costs to the plaintiff, and simply contained a direction for taxation of costs due to the plaintiff as between attorney and

* Appeal from Original Civil, No. 11 of 1907, in Suit No. 873 of 1905.

☞ *The amounts within crotchets are for packing and postage.*

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A Collection of Statutes relating to India. Volume I, containing [illegible] Edition 1899	6	0	0	[10a.]
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General Acts of the Governor-General of India in Council, Vol. III, from 1877 to 1881. Edition 1898	5	0	0	[9a.]
General Acts of the Governor-General of India in Council, Vol. IV, from 1882 to 1884. Edition 1898	7	0	0	[10a.]
General Acts of the Governor-General of India in Council, Vol. V, from 1885 to 1890. Edition 1898	5	0	0	[9a.]
General Acts of the Governor-General of India in Council, Vol. VI, from 1891 to 1898. Edition 1898	7	0	0	[10a.]
General Acts of the Governor-General of India in Council, Vol. VII, from 1899 to 1903, inclusive, Edition 1904 ...	3	0	0	[6a.]

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costs and until such costs should be taxed, and therefore it seems to me that the period between the submission of the bill of the attorney for taxation and the issue of the allocatur in respect of such bills, would be the period which the plaintiff was entitled to have excluded under the operation of section 15.

In looking however into these bills, it appears possible, if not probable, that a certain portion of that period would not necessarily fall within the spirit of section 15 of the Limitation Act, because I observe that after the bills have been taxed they are not passed until the attorney satisfies the Taxing Officer that certain fees included in the bill have been paid, and on various occasions I find that a very long period has elapsed between the date of the taxation of the bills and the passing of the bills by reason of the attorney failing, during that period, to satisfy the Taxing Officer that the sums had been so paid. It seems to me necessary, therefore, to ascertain the correct period which the plaintiff is entitled to have excluded from the general period of limitation The plaintiff should shew what those periods really consist of, because I am of opinion that he was not entitled to have the benefit of these periods which were attributable to his own delay in satisfying the Taxing Officer that the sums due in respect of the fees alleged to have been paid to counsel or otherwise had been in fact paid. It may be of course that the periods in respect of which the plaintiff would be entitled to the benefit of the operation of section 15, would of themselves be sufficient to take the present case out of limitation. It is necessary to have the calculation made. For that purpose I must set this case down in order that the plaintiff should have an opportunity of proving what those periods are."

From this judgment the defendants appealed.

Mr. Garth (*Mr. N. Chatterjee* with him), for the appellants. The effect of an order directing an attorney to have his costs taxed does not stay any suit by him for enforcing payment of his costs: *Lumley* v. *Brooks* (1) and *Coburn* v. *Colledge* (2). The latter case is very much stronger than the present. Section 15 of the Limitation Act does not apply here at all, but Art. 84, Sch. II of that Act does. The attorney in this case ceased to act when he refused to act for his client and when a change of attorney was made. I submit, therefore, that the decision of the lower Court is wrong, and the appeal should be allowed.

Mr. Asghar, for the respondents. Until the amount of the costs was ascertained we could not tell where we should bring our suit. The order, I submit, operates as a stay of the institution of the solicitor's suit for costs. The provisions in s. 15 of the Limitation Act do not exist in England. Therefore, I submit, the English cases cited do not apply. Section 15 of that

(1) (1889) 41 Ch. D. 323. (2) [1897] 1 Q. B. 702.

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General Acts of the Governor-General of India in Council, Vol. III, from 1877 to 1881. Edition 1893	5	0	0	[9a.]
General Acts of the Governor-General of India in Council, Vol. IV, from 1882 to 1884. Edition 1898	7	0	0	[10a.]
General Acts of the Governor-General of India in Council, Vol. V, from 1885 to 1890. Edition 1898	5	0	0	[9a.]
General Acts of the Governor-General of India in Council, Vol. VI, from 1891 to 1898. Edition 1898	7	0	0	[10a.]
General Acts of the Governor-General of India in Council, Vol. VII, from 1899 to 1903, inclusive, Edition 1904 ...	3	0	0	[6a.]

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of costs, was an order amounting in effect to an order staying the institution of a suit by the solicitor. I do not think the case falls within this section. The order of the 1st May 1902 did not stay, by injunction or order, the institution of any suit by the solicitor: it is simply an order for the taxation of his costs. The solicitor—it does not affect the legal question we are discussing—seems to have been very dilatory in the matter, and has only himself to blame for the result. I cannot, however, see that this order was an order by which the institution of any suit by the solicitor was stayed. There was nothing to prevent the solicitor instituting a suit to recover his costs.

I, therefore, think that the appeal must succeed, and the suit must be dismissed with costs, and as the defendants offer to accept out-of-pocket costs throughout, they will get only such costs.

HARINGTON, J. I agree. The order could only affect the right to institute a suit, *if it was an order relating to something* which was a condition precedent to the bringing of the suit. All the authorities show that the taxation of costs is not a condition which must be performed before an action on an attorney's bill may be brought. If that is so, an order for taxation cannot affect the plaintiff's right to bring his action. For these reasons, I agree that this appeal should be allowed.

FLETCHER, J. I also agree. In England there are two forms of order regarding the solicitor's costs. The first is an order for taxation and for payment of costs; and the second is an order *for taxation only. It has never been held that an order for* taxation only is a bar to the institution of a suit; and, I think, that is right on principle. I think the appeal should be allowed.

Appeal allowed.

Attorney for the appellant: *Manmatha Nath Ganguli.*

Attorneys for the respondents: *Shamal Dhone Dutt* and *Shashi Shekhar Banerji.*

R. O. M.

	Rs.	A.	P.	
Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st June, 1891	0	6	0	[1a.]
Act XI of 1886 (Tramways) as modified up to 1st December 1903	0	9	0	[2a.]
Act XIII of 1886 (Securities), as amended by Act XII of 1891	0	2	9	[1a.]
Act VII of 1887 (Suits Valuation), as modified up to 1st October 1904	0	1	9	[1a.]
Act IX of 1887 (Provincial Small Cause Courts), *as modified* up to 1st December, 1900	0	6	0	[1a.]
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899	0	8	0	[1a.]
Act V of 1888 (Inventions and Designs), *as modified up to 1st* July, 1903	0	9	0	[2a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	0	1	9	[1a.]
Act VII of 1889 (Succession Certificates), *as modified up to* 1st December, 1903	0	5	6	[1a.]
Act X of 1889 (Ports), as modified up to 1st April, 1901 ...	0	11	0	[2a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March 1859...	0	7	0	[1a.]
Act XV of 1889 (Official Secrets), as modified up to 1st April 1904	0	3	0	[1a.]
Act IX of 1890 (Railways), as modified up to 1st June 1905 with an Index	1	2	0	[2a.]
Act X of 1890 (Press and Registration of Books), as modified up to 1st December, 1903	0	2	3	[1a.]
Act XII of 1891 (Repealing and Amending Act), shewing the Schedules as modified up to 31st May 1902	0	12	0	[1a. 6p.]
Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897	0	1	3	[1a.]
Act I of 1894 (Land Acquisition), *with footnotes*	0	7	0	[1a]
Act VIII of 1894 (Tariff), as modified up to 1st February, 1906	0	0	0	[2a.]
Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898	0	7	6	[1a. 6p.]
Act IX of 1897 (Provident Funds), as modified up to 1st April 1903	0	1	6	[1a.]
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1903	3	10	0	[8a.]
Act VIII of 1899 (Petroleum), as modified up to 1st December 1904	0	7	0	[1a.]
Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900	0	1	0	[1a.]
Act III of 1900 (Prisoners), as modified up to 1st March 1905	0	6	0	[1a.]
Act XV of 1903 (Extradition), as modified up to 1st December, 1904	0	5	6	[1a.]
Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899	0	6	0	[1a.]
Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July 1903	0	1	9	[1a.]
Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897	0	5	6	[1a.]

before settlement proceedings were instituted: *Secretary of State or India* v. *Kajimuddi*(1).

[MACLEAN C.J. Can you at this stage of the case go behind the entry?]

The entry is not conclusive under s. 103B. Section 105(2) has no application to the present question of the status of a tenant. Under s. 103B the entries are only to be presumed to be correct until the contrary is proved.

Babu Sarat Chandra Roy Chowdhury was not called upon to reply.

The judgment of the Court (MACLEAN C.J. and GEIDT J.) was delivered by

MACLEAN C.J. These appeals arise out of settlement proceedings initiated by the landlord who applied for the preparation of a record-of-rights. An enquiry was held by the Settlement Officer and a draft record-of-rights published on the 31st March 1903, the parties being informed that the record would be open for inspection, and that objections would be received within one month. No objections were preferred, and on 9th June 1903 the record-of-rights was finally published. The Settlement Officer then proceeded in accordance with the landlord's application, to settle fair and equitable rents, and on the 14th August 1903 the tenants, who had been recorded as settled raiyats holding *mal* lands, put in a petition objecting that some of their lands recorded as *mal* were *lakhiraj*, and that their status was that of raiyats holding at a fixed rent. The Settlement Officer on enquiry gave effect to the first of these objections, and altered the entry in the record-of-rights, recording as *lakhiraj* lands which had been put down as *mal*. As regards the second objection, the Settlement Officer held that the raiyats had not proved that they had held lands at a uniform rate of rent since the permanent settlement. The Settlement Officer's orders on these points were upheld by the Special Judge on appeal.

In appeal No. 1033 which is by the landlord, it is objected that the Settlement Officer was not competent to revise the entries

(1) (1899) I. L. R. 26 Calc 617.

	Rs.	A.	P.	
Act VI of 1886 (Births, Deaths and Marriages Registration), *as modified up to 1st June, 1891*	0	6	0	[1a.]
Act XI of 1886 (Tramways) as modified up to 1st December 1903	0	9	0	[2a.]
Act XIII of 1886 (Securities), as amended by Act XII of 1891	0	2	9	[1a.]
Act VII of 1887 (Suits Valuation), *as modified up to 1st October* 1904	0	1	9	[1a.]
Act IX of 1887 (Provincial Small Cause Courts), as modified up to *1st December, 1900*	0	6	0	[1a.]
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899	0	8	0	[1a.]
Act V of 1888 (Inventions and Designs), as modified up to 1st July, 1903	0	9	0	[2a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	0	1	0	[1a.]
Act VII of 1889 (Succession Certificates), *as modified up to* 1st December, 1903	0	5	6	[1a.]
Act X of 1889 (Ports), as modified up to 1st April, 1901 ...	0	11	0	[2a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March 1899...	0	7	0	[1a.]
Act XV of 1889 (Official Secrets), as modified up to 1st April 1904	0	3	0	[1a.]
Act IX of 1890 (Railways), *as modified up to 1st June 1905* with an Index	1	2	0	[2a.]
Act X of 1890 (Press and Registration of Books), as modified up to 1st December, 1903	0	2	3	[1a.]
Act XII of 1891 (Repealing and Amending Act), shewing the Schedules as modified up to 31st May 1902	0	12	0	[1a. 6p.]
Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897	0	1	3	[1a.]
Act I of 1894 (Land Acquisition), with footnotes	0	7	0	[1a.]
Act VIII of 1894 (Tariff), as modified up to 1st February, 1906	0	9	0	[2a.]
Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898	0	7	6	[1a. 6p.]
Act IX of 1897 (Provident Funds), as modified up to 1st April 1903	0	1	6	[1a.]
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1903	3	10	0	[8a.]
Act VIII of 1899 (Petroleum), as modified up to 1st December 1904	0	7	0	[1a.]
Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900	0	1	0	[1a.]
Act III of 1900 (Prisoners), as modified up to 1st March 1905	0	6	6	[1a.]
Act XV of 1903 (Extradition), *as modified* up to 1st December, 1904	0	5	6	[1a.]
Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899	0	6	6	[1a.]
Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July 1903	0	1	9	[1a.]
Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897	0	5	6	[1a.]

1907

SHAMBHU CHANDRA HAZRA v. PURNA CHANDRA PAL.

MACLEAN C J.

tenant is holding an area in excess of that on which his existing rent was fixed. We are, however, unable to entertain this objection, as the order complained of is a decision settling a rent, and on such a point no second appeal lies: see section 109 (subsection 3) of the Bengal Tenancy Act.

In appeal No. 1081 preferred by the tenants, the sole ground urged is that the Settlement Officer was wrong in deciding that their status was not that of tenants holding at fixed rents. For the reasons already given in a former part of this judgment regarding *mal* lands, we are of opinion that the Settlement Officer had no power to entertain their objection as to their status. Their status had been recorded in the draft record as that of settled raiyats. No objection to this entry was made before final publication, nor was any plaint presented to the Settlement Officer for a decision of a dispute on this point.

The result is that the landlord's appeal No. 1033 succeeds in part. The entries in regard to *lakhiraj* lands must be expunged, and the lands entered as *mal*. In this appeal, we direct that each party bear its own costs.

Appeal No. 1081 fails, and is dismissed with costs.

S. M.

Act	Language	Rs.	A.	P.	
Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903	In Urdu ...	1	5	0	[5a.]
	In Nagri ...	1	5	0	[5a]
Act V of 1861 (Police), as modified up to 7th March, 1903	In Urdu ...	0	2	9	[1a.]
	In Nagri ...	0	2	9	[1a.]
Act XVI of 1861 (Stage-Carriages), as modified up to 1st February, 1898	In Urdu ...	0	1	3	[1a.]
	In Nagri ...	0	1	3	[1a.]
Act III of 1864 (Foreigners), as modified up to 1st September, 1906	In Urdu ...	0	1	0	[1a.]
	In Nagri ...	0	1	0	[1a]
Act VI of 1864 (Whipping(, as modified up to 1st April, 1900	In Urdu ...	0	1	6	[1a.]
	In Nagri ...	0	1	6	[1a].
Act III of 1865 (Carriers as modified up to 31st May, 1903	In Urdu ...	0	0	9	[1a.]
	In Nagri ...	0	0	9	[1a.]
Act III of 1867 (Gambling), as modified up to 1st December, 1896	In Nagri ...	0	2	0	[1a.]
Act V of 1869 (Indian Articles of War) as modified up to 1st January, 1895. In English, Urdu and Nagri	Bound ...	3	0	0	[5a.]
	Unbound ...	2	8	0	[5a.]
Act VII of 1870 (Court-fees), as modified up to 1st December, 1896	In Urdu ...	0	8	3	[2a. 6p.]
Ditto ditto as modified up to 1st October, 1899	In Nagri ...	0	8	9	[1a.]
Act I of 1871 (Cattle-trespass), as modified up to 1st December	In Urdu ...	0	1	9	[1a.]
	In Nagri ...	0	1	9	[1a.]
Act XXIII of 1871 (Pensions), ...	In Urdu ...	0	0	9	[1a.]
	In Hindi ...	0	0	9	[1a.]
Act I of 1872 (Evidence), as modified up to 1st May, 1908	In Urdu ...	0	8	0	[2a.]
	In Nagri ...	0	8	0	[2a.]
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904	In Urdu ...	0	2	6	[1a. 6p.]
Act IX of 1872 (Contract), as modified up to 1st September, 1899	In Urdu ...	0	9	9	[3a.]
	In Nagri ...	0	9	6	[3a.]
Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891	In Urdu ...	0	4	0	[2a.]
	In Nagri ...	0	4	0	[2a.]
Act V of 1873 (Government Savings Bank(, ... as modified up to 1st April, 1903 ...	In Urdu ...	0	0	9	[1a.]
	In Nagri ...	0	0	9	[1a.]
Act VIII of 1873 and (Northern India Canal Drainage), as modified up to 15th July, 1899	In Urdu ...	0	3	3	[1a.]
	In Nagri ...	0	3	3	[1a.]
Act X of 1873 (Oaths), as modified up to 1st February, 1903	In Urdu ...	0	0	9	[1a.]
	In Nagri ...	0	1	0	[1a.]
Act IX of 1875 (Majority), as modified up to 1st May, 1906	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act of 1877 (Specific Relief), as modified up to 1st February, 1904	In Urdu ...	0	4	6	[1a 6p.]
	In Nagri ...	0	4	3	[1a 6p.]
Act III of 1877 (Registration), as modified up to 1st December, 1896	In Urdu ...	0	4	3	[2a.]
	In Nagri ...	0	4	0	[2a.]
Act I of 1878 (Opium(, as modified up to 1st December, 1896	In Nagri ...	0	1	6	[1a.]
Act VII of 1878 (Forests), as modified up to 1st December, 1903	In Urdu ...	0	4	0	[1a. 6p.]
	In Nagri ...	0	3	9	[1a. 6p.]
Act XI of 1878 (Arms), as modified up to 1st May, 1904	In Urdu ...	0	2	0	[1a.]
	In Nagri ...	0	2	0	[1a.]
Act XVI of 1878 (Northern India Ferries), as modified up to 1st June, 1902	In Urdu ...	0	2	0	[1a.]
	In Nagri ...	0	2	0	[1a.]

NOTICE.

The next annual stock-taking of the Indian Law Reports kept at the Bengal Secretariat Book Depôt will commence on the 1st April 1909. The public are hereby informed that all issues of the said Reports from the said Depôt to subscribers and officials will be suspended during that month.

F. G. WIGLEY,
Secy. to the Bengal Council,
and Asst. Secy. to the Govt. of Bengal,
Legislative Dept.

LEGISLATIVE DEPT.,
BOOK DEPÔT BRANCH,
The 19th December 1908.

		Rs.	A.	P.	
Act XII of 1887 (Bengal, North West Provinces and Assam Civil Courts)	In Urdu ...	0	1	3	[1a.]
	In Nagri ...	0	1	3	[1a.]
Act XIV of 1897 (Indian Marine), as modified up to 15th February, 1899	In Urdu ...	0	3	6	[1a.]
	In Nagri ...	0	3	6	[1a.]
Act XV of 1887 (Burma Military Police) ...	In Urdu ...	0	0	9	[1a.]
	In Nagri ...	0	0	9	[1a.]
Act XVIII of 1887 (Allahabad University) ...	In Urdu ...	0	1	0	[1a.]
Act III of 1888 (Police), as modified up to 1st March, 1893	In Urdu ...	0	0	6	[1a.]
Ditto (as passed)	In Nagri ...	0	0	6	[1a.]
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	In Urdu ...	0	0	3	[1a.]
Ditto (as passed)	In Nagri ...	0	0	3	[1a.]
Act V of 1888 (Invention and Designs) ...	In Urdu ...	0	2	3	[1a.]
Act VI of 1888 (Debtors)	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act VII of 1888 (Civil Procedure Amendment) ...	In Urdu ...	0	1	9	[1a.]
	In Nagri ...	0	1	9	[1a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act II of 1889 (Measures of Length). ...	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act VI of 1889 (Marchandise Marks), as modified up to 1st February, 1904	In Urdu ...	0	1	9	[1a.]
	In Nagri ...	0	2	0	[1a.]
Act VI of 1889 (Probate and Administration) ...	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act X of 1889 (Ports), as modified up to 1st June, 1894	In Urdu ...	0	5	0	[2a.]
	In Nagri ...	0	5	0	[2a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895	In Nagri ...	0	3	0	[1a. 6p.]
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904	In Urdu ...	0	0	9	[1a.]
	In Nagri ...	0	0	9	[1a.]
Act XVI of 1889 (Central Provinces Land Revenue)	In Urdu ...	0	1	6	[1a.]
	In Nagri ...	0	1	6	[1a.]
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu ...	0	3	0	[1a.]
Act I of 1890 (Revenue Recovery)	In Urdu ...	0	3	0	[1a.]
Act II of 1890 (Amending Acts XVIII of 1864, X of 1865, II of 1874 and V of 1881) ...	In Urdu ...	0	3	0	[1a.]
Act V of 1890 (Indian Forest and Burma Forest Amendment)	In Urdu ...	0	0	6	[1a.]
Act VI of 1890 (Charitable Endowments) ...	In Urdu ...	0	0	6	[1a.]
Act VIII of 1890 (Guardians and Wards) ...	In Urdu ...	0	2	3	[1a. 6p.]
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F. G. WIGLEY,
Secy. to the Bengal Council,
and Asst. Secy. to the Govt. of Bengal,
Legislative Dept.

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Act XVIII of 1850 (Judicial Officers' Protection), with foot-notes	0	1	9	[1a.]
Act XIX of 1850 (Apprentices), as modified up to 1st May, 1905	0	3	6	[1a.]
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	0	2	6	[1a.]
Act VIII of 1851 (Tolls on Roads and Bridges), as modified up to 1st June, 1897	0	2	6	[1a.]
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904	0	1	0	[1a.]
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903	0	2	0	[1a.]
Act XXVIII of 1855 (Usury Laws Repeal), as modified up to 1st December, 1903	0	1	6	[1a.]
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Act XXXIV of 1850 (State Prisoners(, as modified up to 30th April, 1903	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act XII of 1855 (Legal Representatives' suits as modified up to 1st November, 1104 ...	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act XIII of 1855 (Fatal Accident), as modified up to 1st December, 1903	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act XX of 1856, as modified up to 1st November, 1903	In Urdu ...	0	2	6	[1a.]
	In Nagri ...	0	2	6	[1a.]
Act XXXIV of 1858 Lunacy (Supreme Courts)] as modified up to 30th April, 1103 ...	In Urdu ...	0	1	0	[1a.]
	In Nagri ...	0	1	0	[1a.]
Act XXXV of 1858 (Lunacy (District Courts)], as modified up to 30th April, 1903	In Urdu ...	0	1	0	[1a.]
	In Nagri ...	0	1	0	[1a.]
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	In Urdu ...	0	1	6	[1a.]
Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874	In Urdu ...	0	0	3	[1a.]
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Regulations made under the Statute, 33 Vict., Cap. 3 from No. II of 1875 to 1908. 8vo, Stitched.

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V.—TRANSLATION OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

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Act XX of 1847 (Copyright), as modified up to 1st May, 1896	In Urdu .	0	1	3	[1a.]
	In Nagri ..	0	1	3	[1a.]
Act XVIII of 1850 (Judicial Officers' Protection) with foot-notes	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	In Urdu ..	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act XII of 1855 (Legal Representatives' suits as modified up to 1st November, 1104 ...	In Urdu ..	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act XIII of 1855 (Fatal Accident), as modified up to 1st December, 1903 .. .	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act XX of 1856, as modified up to 1st November, 1903	In Urdu ...	0	2	6	[1a.]
	In Nagri ...	0	2	6	[1a.]
Act XXXIV of 1858 Lunacy (Supreme Courts)] as modified up to 30th April, 1903 ..	In Urdu ...	0	1	0	[1a.]
	In Nagri ...	0	1	0	[1a.]
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903 ...	In Urdu ...	0	1	0	[1a.]
	In Nagri ...	0	1	0	[1a.]
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	In Urdu ...	0	1	6	[1a.]
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Act IX of 1860 Employers and Workmen and Disputes) as modified up to 1st December, 1904	In Urdu ...	0	0	3	[1a.]
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Act VI of 1882 (Companies) as modified up to 1st August, 1900	In Urdu ...	0	13	9	[3a.]
	In Nagri ...	0	14	0	[3a.]
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899 ..	In Urdu ...	1	4	0	[1a.]
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 .	In Urdu ...	0	1	0	[1a.]
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1907

GURDEO SINGH
v.
CHANDRIKAH SINGH
AND
CHANDRIKAH SINGH
v.
RASH-BEHARY SINGH.

To determine the question of *res judicata*, it is essential to ascertain what were the rights in dispute between the parties, and what were alleged between them, and this must be done not merely from the decree, but also from the pleadings and judgment.

Surjiram Marwari v. *Barhamdeo Persad* (1) and *Magniram* v. *Mehdi Hossein Khan* (2), referred to.

In a suit to enforce a second mortgage, the first mortgagee is not a necessary party.

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants; but for this there must be a conflict of interest amongst the defendants and the judgment must define the real rights and obligations of the defendants *inter se*.

Magniram v. *Mehdi Hossein Khan* (2), *Chajju* v. *Umrao Singh* (3), *Balambhat* v. *Narayan Bhat* (4), *Muhammad Kuni Routhan* v. *Visvanathaiyar* (5) and *Cottingham* v. *Earl of Shrewsbury* (6), referred to.

To entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected.

The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no obligation to make the payment and not being compelled to do so for the preservation of any rights or property of his own.

Subrogation is by redemption, and, unless there is redemption, no subrogation can take place.

Where, therefore, sums paid by a subsequent mortgagee were applied only in part satisfaction of the claim for interest due upon earlier bonds, a claim for subrogation could not arise. The rule is, that before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied so that he shall be relieved from all further trouble, risk and expense

Merritt v. *Hosmer* (7), *Street* v. *Beal* (8), *O'Reilly* v. *Holt* (9), *Carter* v. *Neal* (10) and *Hollingworth* v. *Floyd* (11), referred to.

(1) (1905) 1 C. L. J. 337.
(2) (1903) I. L. R. 31 Calc. 95.
(3) (1900) I. L. R. 22 All. 386.
(4) (1900) I. L. R. 25 Bom. 74.
(5) (1902) I. L. R. 26 Mad. 337.
(6) (1843) 3 Hare 627.
(7) (1858) 11 Gray 276; 71 Am. Dec. 713.
(8) (1864) 16 Iowa 68; 85 Am. Dec. 504.
(9) (1877) 4 Woods C. C. 645; 18 Fed Cases 792.
(10) (1858) 24 Georgia 346; 71 Am Dec. 136.
(11) (1807) 2 Harris & Gill (Maryland) 91.

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1907

GURDEO SINGH v. CHANDRIKAH SINGH AND CHANDRIKAH SINGH v. RASHBEHARY SINGH.

In execution of their decrees the mortgagees purchased property comprised in their security. On the 5th of 1887, they executed another mortgage bond in favo defendants 5 to 8 mortgaging a share of Raipur Chur another village. On the 31st May 1894, the mortgagees to enforce their securities against the mortgagors and against the mortgagee of 1886. On the 21st of May the suit was decreed against the mortgagors, but dism against the predecessor-in-title of the plaintiffs. In exec of the decree the mortgagees purchased the property incl in their security. On the 29th of March and 2nd of 1895, the defendants Nos. 1 to 4 excluded two mortgag favor of defendants 9 to 12; the properties comprised in security were shares of Mehal Raipur Chur, which incl Kachnath and Burkavi. In 1899 the mortgagees broug suit to enforce their mortgage against the mortgagors ma also defendants Nos. 5 to 8, No. 14 and the present plaintiff, who took a conveyance from the mortgagees of for the benefit of himself and the other plaintiff, as p defendants. On the 8th April 1900, the mortgagees obta a decree, which reserved in favor of defendants Nos. 5 to declaration of priority not merely in respect of their bon 1884, but also with regard to a certain sum out of the due to them under the bond of 1887. The decree, howe directed that the mortgagors should proceed in the instance against properties other than Mouzah Rai Chur. On the 23rd of November 1900, the mortgagees execution of the decree purchased Kachnath and Burk in partial satisfaction of their dues.

The suit was defended by the defendants Nos. 5 to 8 the defendants Nos. 9 to 12, on the ground that the bond 1186 executed in favour of the predecessor in interest of plaintiffs was not a *bona fide* document, and the plaint were not entitled to sell the properties, which the defenda had already sold in execution of their mortgage decrees.

The learned Subordinate Judge passed the usual mortg decree in favor of the plaintiffs for Rs. 9,121, and directe

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which included three villages, Raipur Khas, Kachnath and Burkavi. The mortgagors undertook to repay the loan on the 13th June 1889. Subsequently, on the 1st February 1898, the plaintiffs purchased from the mortgagee his rights under the security of 1886, and, on the 15th June 1900, commenced the present action to enforce them. The defendants, against whom relief is claimed or who are sought to be bound by the decree in the present litigation, may be divided into three groups. The first four defendants are the mortgagors; the next four are some encumbrancers, who have enforced their securities as against the mortgagors; and the third set of four defendants are other encumbrancers similarly situated.

The transactions, by which these two sets of defendants claim to have acquired an interest in the properties included in the mortgage, which is the foundation of the title of the plaintiffs, appear to be as follows. On the 15th December 1884, the first four defendants executed a mortgage in favour of defendants 5 to 8 in respect of a share of Mehal Raipur Chur. On the 31st May, 1894, the mortgagees sued to enforce their security, and joined as parties defendants, not only their mortgagors, but also the predecessor in interest of the present plaintiffs, namely, the mortgagee of 1886. On the 21st March 1895, the mortgagees obtained a decree as against their mortgagors, but their claim was dismissed as against the mortgagee of 1886. Subsequently, they executed this decree and became purchasers of the property comprised in their security. On the 5th May 1887, the first four defendants executed a mortgage in favour of defendants 5 to 8 and the properties comprised in this security were shares in Mehal Raipur Chur and another property by name Chandharwa. On the 31st May 1894, the mortgagees sued to enforce their security, and joined as parties defendants their mortgagors, as also the mortgagee of 1886. On the 21st March 1895, the suit was decreed as against the mortgagors, but was dismissed as against the predecessor in title of the present plaintiffs. Subsequently, they executed their decree and became purchasers of the properties comprised in their security.

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5 to 8 and the balance of the judgment debt due to defendants 9 to 12. Against this decree, objection has been taken by all the parties interested. Defendants 5 to 7 have preferred Appeal No. 540 of 1904. The plaintiffs have preferred Appeal No. 566 of 1904 and a memorandum of cross-objection has been presented on behalf of defendants 9 to 12.

On behalf of defendants 5 to 7 the judgment of the lower Court has been assailed substantially on four grounds, namely, *first*, that the Subordinate Judge had no jurisdiction to hear the case; *secondly*, that the decrees obtained by these defendants on the basis of their mortgages of 1884 and 1887 operate as *res judicata*, so that the plaintiffs are not entitled to enforce their security as against the properties purchased by the appellants in execution of the two decrees obtained by them; *thirdly*, that the appellants are entitled to priority over the mortgage of the plaintiffs, not only in respect of their mortgage of 1884, but also in respect of the sum of Rs. 1,952, which formed part of the consideration of their mortgage of 1887; and *fourthly*, that the plaintiffs are not entitled to interest upon their security at the rate claimed, as they had subsequently entered into a valid compromise by which they undertook to reduce the rate of interest.

On behalf of the plaintiffs, the decision of the Subordinate Judge has been challenged substantially on two grounds, namely, *first*, that the decisions in the suits commenced by the mortgagees of 1884 and 1887 to enforce their securities, which were ultimately dismissed as against the predecessor in interest of the plaintiffs, operate as *res judicata*, and that consequently the plaintiffs are entitled to enforce their security precisely in the same manner as if the mortgages of 1884 and 1887 had never been created, and *secondly*, that defendants 5 to 8 and 9 to 12 are bound to render an account of the profits of the property, of which they have taken possession as purchasers at the sales held in execution of their decrees. On behalf of defendants 9 to 12 the decision of the Subordinate Judge has been challenged on the ground that they are entitled to their costs of the litigation from the plaintiffs, whose claim has substantially



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referred to It is not incumbent on the Judge to read the whole of the depositions of the witnesses to the Jury. It is enough that references have been made to them so as to sufficiently attract their attention to them. It is not necessary that the Judge should

the Jury might properly draw any inference they pleased from such omission. Section 141 of the Penal Code is sufficiently

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trict Court has no power, after it has withdrawn a suit and placed it on the files, to transfer it to any Subordinate Court. In support of this position, reliance has been placed upon the cases of *Ram Charittar Roy* v. *Bidhata Roy* (1) and *Sita Ram* v. *Nauni Dulaiya* (2).

It has been argued, on the other hand, by the learned vakil for the appellants respondents that there are at least three answers to the contention of the appellants, namely, *first*, that the District Judge had inherent power, apart from the provisions of section 25 of the Code of Civil Procedure, to transfer a suit from his Court to that of the Subordinate Judge; *secondly*, that if he did not possess such power, the Subordinate Judge has not acted without jurisdiction, but has at best assumed jurisdiction in an irregular manner, and that consequently the defendants, who had acquiesced in the exercise of such jurisdiction, ought not to be permitted now to question the legality of the proceedings before the lower Court; and *thirdly*, that the defect, if any, is cured by section 578 of the Code of Civil Procedure, inasmuch as the order of transfer might undoubtedly have been made by this Court, if not by the District Court, and that, if any objection had been taken in time before the Subordinate Judge, the plaintiffs might also have avoided the defect by the presentation of a new plaint, as no question of limitation could possibly arise upon the admitted facts of the case. In our opinion the contention of the learned vakil for the plaintiffs respondents furnishes, in each of its three branches, a complete and conclusive answer to the plea of want of jurisdiction advanced by the appellants. The case of *Ram Charittar Roy* v. *Bidhata Roy* (1) is, no doubt, an authority for the proposition that, when once a District Judge withdraws a suit to his own file for trial, he is not competent, under section 25 of the Civil Procedure Code, to retransfer it to the Court from which the case had been withdrawn. The case of *Sita Ram* v. *Nauni Dulaiya* (2) appears to go still further, as the learned Judges held that section 25 has no application to a case remanded

(1) (1906) 10 C. W. N. 902. (2) (1899) I. L. R. 21 All. 230.

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given by the Code of Civil Procedure, which binds Courts only in so far as it goes; the powers of the Court are not rigidly circumscribed by the provisions of the Code, and it is not possible to maintain the theory that the Court has no power to make a particular order, though it may be absolutely essential in the interests of justice, unless some section of the Code can be pointed out as a direct authority for it. We are not unmindful that there are, perhaps, observations in the case of *Bidya Moyee Debya Chowdhurani* v. *Surja Kanta Acharji* (1), which may, at first sight, appear to militate against this view, and may lend some colour of support to the contention that a District Judge has no inherent power to transfer a case either from his own Court or from that of an officer under his administrative control, and that the power must be one conferred by Statute. The circumstances of that case, however, were of an entirely different description, and it was not intended there to decide the question, which has been raised before us.

We are, therefore, disposed to hold that the District Judge had power, under the circumstances disclosed in the order-sheet, to make the order of transfer, which he did; and we arrive at this conclusion without hesitation, as the result of our view undoubtedly accords with what has been for many years past the well-established practice. We may further point out that, as was laid down by their Lordships of the Judicial Committee in the case of *Syud Tuffuzzool* v. *Rughoo Nath* (2), to proceed to recall and cancel an invalid order is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor; see also *Hiralal Mukerji* v. *Premamoyee Debi* (3), where the application of this principle is explained. We are unable to appreciate why this principle should not be applied to the case before us. If the District Judge, who has transferred a case to his Court, discovers that the very object, with which the case was transferred, is likely to fail by reason of unforeseen circumstances, it would be unreasonable

(1) (1905) I. L. R. 32 Calc. 875. (2) (1871) 14 Moo I. A. 40, 51.
(3) (1905) 2 C. L J. 306, 309

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his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. To the same effect are the observations of their Lordships in the case of *Meenakshi Naidoo* v. *Subramanya Sastri* (1), where their Lordships affirmed the view taken in *Ledgard* v. *Bull* (2) and pointed out that a waiver of a right to complain for want of jurisdiction is inapplicable only if there is an inherent incompetency in the Court to deal with the question brought before it, and that no consent can confer upon a Court that jurisdiction, which it never possessed. This distinction between an absolute want of jurisdiction and an irregular assumption of jurisdiction has, sometimes, been overlooked.

But the foundation of the distinction is fully explained in the Order of Reference to a Full Bench in the cases of *Sukh Lal Sheikh* v. *Tara Chand Ta* (3) and *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (4). In the first of these cases, it was pointed out that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it, *Rhode Island* v. *Massachussetts* (5). Such jurisdiction naturally divides itself into three broad heads, namely, with reference to (1) the subject matter, (2) the parties, (3) the particular question which calls for decision, Black on Judgments, section 215.

A Court cannot adjudicate upon a subject matter, which does not fall within its province as defined or limited by law; this jurisdiction may be regarded to be essential, for jurisdiction over the subject matter is a condition precedent to the acquisition of authority over the parties, and, if a Court has no jurisdiction over the subject matter of the controversy, consent of the parties cannot confer such jurisdiction, and a judgment made without jurisdiction in such a case is absolutely null and void, it may be set aside by review or appeal, or its

(1) (1887) L. R. 14 I. A. 160; I. L. R. 11 Mad. 26.

(2) (1886) L. R. 13 I. A. 134; I. L. R. 9 All. 191.

(3) (1905) I. L. R. 33 Calc. 68; 2 C. L. J. 241.

(4) (1905) I. L. R. 33 Calc. 352; 3 C. L. J. 259.

(5) (1838) 12 Peters U. S. 657.

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Harkness v. *Hyde* (1), *Jollaud* v. *Sprague* (2), *Rhode Island* v. *Massachussetts* (3).

To put the matter from another point of view, it is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction; in all other cases, this objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of the jurisdiction is first claimed, *Hobart* v. *Frost* (4); Black on Judgments, section 217.

On this ground, we must hold, as regards the second branch of the contention of the respondents, that the defendants have waived their right to take exception to the power of the Subordinate Judge to try the cause under authority of an order of transfer made by the District Judge. As regards the third branch of the contention of the respondents, namely, that the objection is entirely devoid of all substance, it is manifest from other considerations. It cannot be disputed that the order of transfer might have been made by the High Court. If, therefore, objection had been taken by the defendants either at the time, when the District Judge made his order or at the time when the Subordinate Judge dealt with the case on the merits, it would have been open to the plaintiffs to obtain an order from this Court, which would have cured the defect. It may further be pointed out that, if the objection had been taken at the time, it would have been open to the plaintiffs to present even a new plaint to the Subordinate Judge Indeed, if the suit be assumed to have been instituted on the day when the Subordinate Judge took cognizance of it, it would not be open to objection on the ground of limitation, because, although the due date upon the bond expired on the 13th June 1889, the liability of the mortgagors was kept alive by acknowledgment made within twelve years from the date of the present suit. From every point of view, therefore, it

(1) (1878) 98 U S 476.
(2) (1838) 12 Peters U. S 300
(3) (1838) 21 Peters U. S. 657, 718.
(4) (1856) 5 Duer N. Y. 672.

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Before Mr Justice Mookerjee and Mr Justice Holmwood

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*Jurisdiction—Retransfer—District Judge—Civil Procedure Code (Act XIV of 1882), ss 13 and 25—The Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), ss 9 and 18—Inherent power—Waiver of jurisdiction—*Res judicata*—Mortgage, subrogation of—Compromise decree, when binding.*

A suit was instituted originally in the Court of the second Subordinate Judge, the District Judge transferred the case to his own Court acting in the exercise of the powers conferred on him by section 25 of the Code of Civil Procedure (Act XIV of 1882) Subsequently, the District Judge transferred the case to the first Subordinate Judge as he himself was about to proceed on leave. The case was tried by him and no objection was taken by either party to the effect that the Subordinate Judge had no jurisdiction to try the case On an objection taken as to the want of jurisdiction

Held that, inasmuch as under section 9 of Act XII of 1887 the District Judge had administrative control over all the Civil Courts within the local limits of his jurisdiction, he had inherent power to transfer the case from his own Court to that of a Subordinate Judge, especially when the order was for the obvious benefit of the litigants and for the speedy determination of the matter

Held further, that under section 18 of Act XII of 1887, the Subordinate Judge unquestionably possessed jurisdiction over the subject-matter of the litigation, and that therefore the case was not one of absolute want of jurisdiction, but was at best an irregular assumption of jurisdiction, and as no objection at an earlier stage of the proceedings was taken by the defendants appellants they waived their right to take exception to the power of the Subordinate Judge to try the cause under authority of an order of transfer made by the District Judge

* Appeals from Original Decrees Nos. 540 and 566 of 1904, against the decrees of Babu Sashi Bhusan Chowdhry, Subordinate Judge of Shahabad, dated August 18, 1904

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tion of the plaint in that case shows that he was brought on the record as a puisne encumbrancer interested in the mortgaged premises. He filed a written statement in which he challenged the validity of the plaintiff's mortgage and alleged that it was fraudulent and without consideration. He further pleaded that the plaintiffs had no valid cause of action as against him. Upon these pleadings, issues were raised, one of which was, whether the bond was genuine and *bona fide*, and another was, whether the plaintiffs had any cause of action against that defendant. The Subordinate Judge, who tried the case, found that neither party had proved that this particular defendant was in any way interested in the mortgaged property. He also held that the evidence adduced to establish the payment of consideration for the mortgage was not satisfactory or reliable, and that the admission of the mortgagors that they had received the sum alleged to have been advanced was no evidence against the other defendants.

In this view of the matter, the Court dismissed the suit against the mortgagee of 1886, but made a decree against the mortgagors, as they had confessed judgment. The decree directed the sale of the mortgaged property only in so far as the mortgagors were concerned. As we have already stated, the mortgagees decree-holders subsequently executed this decree and purchased the property at the execution sale. As regards the mortgage of 1887, the mortgagees, the present defendants 5 to 8, commenced their suit against the mortgagors and the mortgagee of 1886. An examination of the plaint shows that it does not disclose any cause of action against the mortgagee of 1886. It will be observed that the mortgagee of 1866 was not a necessary party to enforce the mortgage of 1887; for, as was explained by this Court in the case of *Surjiram Marwari* v. *Barhamdeo Persad* (1) in a suit to enforce a second mortgage, the first mortgagee is not a necessary party. No doubt in one of the paragraphs of the plaint it was alleged that a portion of the consideration money for the mortgage of 1887, namely, Rs. 1,952, had been applied

(1) (1905) 1 C. L. J. 337, 351.

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A petition of compromise, in so far as it relates to properties in suit, does not require registration under section 17 of the Registration Act (III of 1877), and the decree, in so far as it gives effect to the settlement touching such properties, operates as *res judicata*. If it gives effect to the settlement touching properties extraneous to the litigation, the decree is to that extent without jurisdiction and is inoperative. In relation to these extraneous properties, the parties must fall back upon the petition itself, which cannot without registration effectively declare or create a title to immoveable property exceeding one hundred rupees in value.

Pranal Anni v. *Lakshmi Anni* (1), *Muthayya* v *Venkataratnam* (2), *Birbhadra Rath* v. *Kalpataru Panda* (3), *Kali Charan Ghosal* v *Ram Chandra Mandal* (4), *Patha* v. *Esup* (5) and *Achutaramraja* v *Subbaraju* (6), referred to.

APPEALS by the defendants 5 to 7 and the plaintiffs respectively.

THIS appeal arose out of a suit brought by the plaintiffs to enforce a deed of mortgage dated the 23rd of November 1866. The bond was executed by the defendants Nos 1 to 4 in favor of defendant No. 14. The properties comprised in the bond were Mehal Raipur Chur, which included the villages Raipur Khas, Kachnath and Burkavi On the 1st of February 1898, the plaintiffs purchased the rights under the security of 1886, and they brought the present suit to enforce their mortgage on the 15th of June 1900, against the mortgagors and also some encumbrancers, who have enforced their security against the said mortgagors. It appeared that on the 15th of December 1884, defendants Nos. 1 to 4 executed a mortgage bond in favor of defendants 5 to 8 in respect of a share of Mehal Raipur Chur. On the 31st of May 1894, the mortgagees brought a suit against the mortgagors making the mortgagees of 1886 a party defendant to the suit. On the 21st of March 1895, the suit was decreed against the mortgagors, but was dismissed against the mortgagees of 1886.

(1) (1899) L. R. 26 I. A. 101, I. L. R. 22 Mad 508.
(2) (1901) I. L. R. 25 Mad 553
(3) (1905) 1 C. L. J 388
(4) (1903) I. L. R 30 Calc. 783.
(5) (1906) I. L. R 29 Mad. 365.
(6) (1901) I. L. R. 25 Mad. 7

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the mortgagee of 1886, defendants 5 to 8 are now precluded from relying upon their mortgages of 1884 and 1887, which they had unsuccessfully attempted to enforce as against their predecessor in the two earlier litigations, to which we have referred. In support of this position, reliance is placed upon the decision of their Lordships of the Judicial Committee in the case of *Run Bahadur Singh* v. *Lucho Koer* (1). After a careful examination of the authorities upon which reliance is placed on both sides, we are clearly of opinion that the contention of the plaintiffs is well founded and must prevail. It is not necessary to examine minutely the decisions in *Srigopal* v. *Pirthi Singh* (2) and *Gopal Lal* v. *Benarasi Pershad Chowdhry* (3), upon which reliance is placed on behalf of the defendants 5 to 8. The true foundation of the doctrine laid down in those cases was fully explained by this Court in the case of *Surjiram Maruari* v. *Barhamdeò Persad* (4). That principle to our mind has no application to the facts of the present case. It has been strenuously argued by the learned vakil for the defendants 5 to 8 that the mortgagee of 1886 was bound to establish his title, when he was brought before the Court in the litigations of 1894, and that his omission or failure to do so precluded him from relying upon that title in the present litigation. In our opinion, there is no foundation for this argument. So far as the security of 1887 was concerned, the mortgagee of 1886 was, as we have already explained, not a necessary party to the suit to enforce it. No doubt he might be a necessary party, if the plaintiffs attempted to obtain priority in favour of their mortgage of 1887 over the mortgage of 1886. But, although a suggestion to that effect was made in the plaint, there was no relief expressly claimed on that basis. The question was not even raised in the issues, and the suit ultimately failed by reason of the failure of the mortgagees of [illegible] the genuineness of their security as [illegible] of 1886. In the same manner,

(1904) I. L. R. 31 Calc. 428.
[illegible], 1 C. L. J. 337, 350.

the decretal amount is not paid within three months, the mortgaged property, Mouzah Raipur Chur, is to be sold subject to the prior mortgage charge of defendants Nos. 5 to 8, and subject to the charge of the remaining decretal money of defendants Nos. 9 to 12.

Against this decree defendants Nos 5 to 7 preferred appeal No 540 of 1904, the plaintiffs preferred appeal No. 566 of 1904, and a memorandum of cross objection was filed on behalf of defendants Nos. 9 to 12.

Babu Raghunandan Prasad and *Babu Raghunath Singh* for the appellants in No 540.

Dr. Rash Behari Ghose, Babu Umakali Mookerjee, Babu Jogendra Chandra Ghose, Babu Mohendra Nath Roy and *Moulvie Mahomed Habibullah* for the respondents.

Dr. Rash Behari Ghose, Babu Umakali Mookerjee, Babu Jogendra Chandra Ghose and *Babu Kulwant Sahay* for the appellants in No 566.

Babu Mohendra Nath Roy, Babu Raghunandan Prasad and *Moulvie Mahomed Habibullah* for the respondents

Cur adv vult

MOOKERJEE J. The circumstances, which gave rise to the litigation out of which the present appeals arise are in some measure complicated, but although they were in controversy between the parties in the Court below, the facts found by the Subordinate Judge have not been challenged before us. These facts, in so far as it is necessary to state them for the disposal of the questions of law raised in the two appeals, may be briefly stated On the 23rd November 1886, the first four defendants in the present suit executed a mortgage in favour of the father of defendant No. 14 The property comprised in the security consisted of a share in Mehal Raipur Chur,

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the mortgagee of 1886, defendants 5 to 8 are now precluded from relying upon their mortgages of 1884 and 1887, which they had unsuccessfully attempted to enforce as against their predecessor in the two earlier litigations, to which we have referred. In support of this position, reliance is placed upon the decision of their Lordships of the Judicial Committee in the case of *Run Bahadur Singh* v. *Lucho Koer* (1). After a careful examination of the authorities upon which reliance is placed on both sides, we are clearly of opinion that the contention of the plaintiffs is well founded and must prevail. It is not necessary to examine minutely the decisions in *Srigopal* v. *Pirthi Singh* (2) and *Gopal Lal* v. *Benarasi Pershad Choudhry* (3), upon which reliance is placed on behalf of the defendants 5 to 8. The true foundation of the doctrine laid down in those cases was fully explained by this Court in the case of *Surjiram Maruari* v. *Barhamdeo Persad* (4). That principle to our mind has no application to the facts of the present case. It has been strenuously argued by the learned vakil for the defendants 5 to 8 that the mortgagee of 1886 was bound to establish his title, when he was brought before the Court in the litigations of 1894, and that his omission or failure to do so precluded him from relying upon that title in the present litigation. In our opinion, there is no foundation for this argument. So far as the security of 1887 was concerned, the mortgagee of 1886 was, as we have already explained, not a necessary party to the suit to enforce it. No doubt he might be a necessary party, if the plaintiffs attempted to obtain priority in favour of their mortgage of 1887 over the mortgage of 1886. But, although a suggestion to that effect was made in the plaint, there was no relief expressly claimed on that basis. The question was not even raised in the issues, and the suit ultimately failed by reason of the failure of the mortgagees of 1887 to establish the genuineness of their security as against the mortgagee of 1886. In the same manner,

(1) (1884) I. L. R. 11 Calc. 301, 306.
(2) (1902) L. R. 29 I. A. 118; I. L. R. 24 All. 429.
(3) (1904) I. L. R. 31 Calc. 428.
(4) (1905) 1 C. L. J. 337, 350.

On the 29th March and 2nd June 1885, the first four defendants executed two mortgages in favour of defendants 9 to 12. The properties comprised in these securities were shares of Mehal Raipur Chur, which included Kachnath and Burkavi. In 1899 the mortgagees brought a suit to enforce their security and joined as parties defendants, not only their mortgagors, but also defendants 5 to 8, that is, the mortgagees of 1884 and 1887, defendant 14, that is, the mortgagee of 1886, and the present second plaintiff, who had taken a conveyance from the mortgagee of 1886 for the benefit of himself and the other plaintiff. On the 5th April 1900, the mortgagees obtained a decree, which reserved in favour of defendants 5 to 8 a declaration of priority, not merely in respect of their bond of 1884, but also with regard to a sum of Rs. 1,172 out of the debt due to them under their bond of 1887. The decree, however, directed that the mortgagees should proceed in the first instance against properties other than Mehal Raipur Chur On the 23rd November 1900, the mortgagees enforced their decree and purchased Kachnath and Burkavi in partial satisfaction of their dues. This did not, however, affect their right to proceed against Raipur Chur for the realization of the remainder of their dues under their mortgage decree

In the present case the claim of the plaintiffs under the mortgage of 1886 has been resisted substantially by the two sets of defendants, whom we have described as defendants 5 to 8 and defendants 9 to 12, and the principal point in controversy between the parties is as to the manner in which their respective rights under the different mortgages and execution sales are to be regulated. The learned Subordinate Judge has made the usual mortgage decree in favour of the plaintiffs for Rs. 9,121, and has directed that, if the decretal money is not paid within three months, the mortgaged property Mehal Raipur Chur is to be sold subject to the prior mortgage charge of defendants 5 to 8 and subject to the charge of the remaining decretal money of defendants 9 to 12, so that the purchaser at the auction sale will have to pay up the mortgage lien of defendants

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defendants 5 to 8 (as puisne encumbrancers) and defendant 14 (as subsequent mortgagee), as defendants on the other hand, the present defendants 5 to 8 succeeded in obtaining a declaration that not only in respect of their bond of 1884, but also in respect of a sum of Rs. 1,172 out of the consideration for their bond of 1887, they were entitled to priority over the bond of 1885. That question, however, appears to have been then decided between the present defendants 5 to 8 and 9 to 12; it is clear that there was no controversy in that litigation between defendants 5 to 6 and 14, the predecessor of the plaintiffs, in respect of this matter. It cannot, therefore, be suggested that the decision in that litigation in any way operates as *res judicata* for, as is now well settled, when an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants; but for this, there must be a conflict of interest amongst the defendants, and the judgment must define the real rights and obligations of the defendants *inter se;* see *Magniram* v. *Mehdi Hossein Khan* (1), *Chajju* v. *Umrao Singh* (2), *Balam Bhat* v. *Narayan Bhat* (3), *Muhammad Kuni Rowthan* v. *Visvanathaiyar* (4) and *Cottingham* v. *Earl of Shrewsbury* (5).

No materials have been placed before us to show that the decisions in the suit, to which we have referred, was given under circumstances, which could possibly make it operate as *res judicata* between co-defendants. We must, consequently, hold that the decisions in the suits of 1894, brought by defendants 5 to 8 to enforce their mortgages of 1884 and 1887, operate as *res judicata*, and as those suits were dismissed, rightly or wrongly, against the mortgagee of 1886, the defendants 5 to 8 are not entitled to rely upon those mortgages as against the plaintiffs, who now represent the mortgagee of 1886. The true test to be applied to a case of this descrip-

(1) (1903) I. L. R. 31 Calc. 95.
(2) (1900) I. L. R. 22 All. 386.
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failed as against them. We shall first take up the points raised in the appeal of the defendants 5 to 7; but as the question of *res judicata* is raised by these defendants as also by the plaintiffs, it will be convenient, if we discuss this question from the points of view of both the parties

The *first* ground taken on behalf of defendants 5 to 7 raises the question of the jurisdiction of the Subordinate Judge to entertain this suit. The circumstances, so far as it is necessary to state them for the elucidation of this point, appear to be as follows:—The present action was commenced on the 15th June 1900, and it was originally instituted in the Court of the second Subordinate Judge of Shahabad. On the 22nd June 1901, the District Judge transferred the case to his own Court, and it may be presumed that he acted in exercise of the powers conferred upon him by section 25 of the Code of Civil Procedure. On the 24th June following, the suit was dismissed by the District Judge for want of prosecution The plaintiffs appealed to this Court, and on the 25th February 1904, a Division Bench allowed the appeal and sent back the case to the District Judge for rehearing After the records had been remitted to the District Judge, the case remained pending in his Court from the 7th June to the 25th June 1904 On the latter date, the District Judge transferred the case to the first Subordinate Judge as he himself was about to proceed on leave On the 28th June, the case was received by the Subordinate Judge, and the trial lasted from the 28th July to the 18th August 1904. No objection was taken by either party to the effect that the Subordinate Judge had no jurisdiction to try the case. It is now contended, however, that the Subordinate Judge had no jurisdiction, and, as the question is one of jurisdiction, we have allowed the appellants to take it, although it had not been suggested at any earlier stage of the proceedings. The ground, upon which the objection is founded, is that although under section 25 of the Code of Civil Procedure a District Court has power to withdraw any suit pending in a Court of first instance subordinate to it and to try the suit itself or transfer it for trial to any other Subordinate Court competent to try it, the Dis-

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defendants 5 to 8; another sum of Rs. 1,072 was applied in discharge of interest due on a bond of the 29th March 1885, and a third sum of Rs. 780 was applied in satisfaction of the interest due on a bond of the 2nd June 1885. Upon these facts, it is argued by the learned vakil for defendants 5 to 7 that to the extent of these three sums of money, which were applied in satisfaction of interest due on three bonds earlier than that of the present plaintiffs, they are entitled to a declaration of priority. In support of this position, reliance is placed upon the cases of *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1), *Gopal Chunder Sreemany* v. *Herembo Chunder Holdar* (2) and *Lomba Gomaji* v. *Vishvanath Amrit Tilvankar* (3).

It is argued, on the other hand, by the learned vakil for the plaintiffs respondents that there are two objections to the right claimed by the defendants, each of which is fatal to their contention It is pointed out, in the *first* place, that the decision of this question is barred by the principle of constructive *res judicata*, and it is contended, in the *second* place, that upon the admitted facts, the principle of subrogation has no possible application. In our opinion, the argument advanced on behalf of the appellants is not well founded, and their contention must be overruled. It is manifest that this claim for priority might and ought to have been set up in the litigation of 1894 in which the mortgage of 1887 was enforced. (Jones on Mortgages, sections 1439-41 and 1589A, 6th edition, Vol. II, pages 397 and 526.) Indeed, as we have already pointed out, the mortgagees did set out in their plaint circumstances sufficient to form the foundation of the claim now advanced. It was not, however, pressed, and the suit appears to have been dismissed so far as the mortgagee of 1886 was concerned. There is, therefore, considerable force in the contention that it is no longer open to the mortgagees of 1887 to set up in the present litigation the claim for priority, which might and ought to have been adjudicated upon in the litigation of 1894. See

(1) (1884) L. R. 11 I. A. 126, I. L. R. 10 Calc. 1035.

(2) (1889) I. L. R. 16 Calc 523

(3) (1893) I. L. R 18 Bom. 86.

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under section 562. The cases of *Sakharam* v. *Gangaram* (1), *Amir Begum* v. *Prahlad Das* (2) and *Nundan Prasad* v. *W. C. Kenney* (3) also support the view that, where a District Judge has once exercised the powers conferred by section 25 of the Civil Procedure Code and transferred a case to his own Court from that of the Subordinate Judge, he cannot afterwards retransfer such case.

In these cases, however, the Court was not invited to consider whether, apart from the provisions of section 25 of the Civil Procedure Code, the District Court may not have authority to make an order of the description now in question before us. In our opinion, there is considerable force in the contention of the learned vakil for the plaintiffs respondents that as under section 9 of Act XII of 1887, the District Judge has administrative control over all the Civil Courts within the local limits of his jurisdiction, it ought to be held that the District Judge has inherent power to transfer a case from his own Court to that of the Subordinate Judge, specially when, as in the present instance, the order was made for the obvious benefit of the litigants and for the speedy determination of the matter. It has been ruled by this Court, in the cases of *Panchanan Singha Roy* v. *Dwarka Nath Roy* (4) and *Hukum Chand Boid* v. *Kamalanand Singh* (5), that the Code of Civil Procedure was not intended to be, and is not, exhaustive. As was observed in the case of *Rasik Lal Datta* v. *Bidhumukhi Dasi* (6), the Code does not affect the power and duty of the Court in cases where no specific rule exists, and the Court should act according to equity, justice and good conscience, though in the exercise of such power it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intention of the legislature.

We agree entirely with the view indicated in the cases mentioned that the Courts in this country have, in matters of procedure, powers beyond those which are expressly

(1) (1899) I. L. R. 13 Bom. 654.
(2) (1902) I. L. R. 24 All. 304.
(3) (1902) I. L. R. 24 All. 356.
(4) (1905) 3 C. L. J. 29.
(5) (1905) I. L. R. 33 Calc. 927; 3 C. L. J. 67.
(6) (1906) I. L. R. 33 Calc. 1094; 4 C. L. J. 493.

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or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. The foundation of the rule was elaborately examined in a recent case, *Wilkins* v. *Gibson* (1), in which Mr. Justice Cobb stated the rule to be that a "Subrogation will arise only in those cases, where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor that he would be subrogated to the rights and remedies of the creditor." This distinction between the position of a person, who pays off a mortgage to protect an interest of his own and the position of another, who claims subrogation by agreement, is well marked, and is said to have been borrowed from the Civil Law, which recognised two kinds of subrogation, namely, "legal subrogation" which took place of right and without any agreement as such by the creditor and as a matter of equity, and "conventional subrogation" which was applied, where an agreement was made with the person paying the debt that he would be subrogated to the rights and remedies of the original creditor. See Howe's Studies in the Civil Law, 1905, page 256; see also *Bank* v. *Tillman* (2), where the doctrine of conventional subrogation is examined. The case of *Gokaldas Gopaldas* v. *Puran Mal Premsukhdas* (3), where it was held that the purchaser of an equity of redemption, who had paid off the first charge, might use the first mortgage as a shield against mesne encumbrancers, the payment being made by a person who is under no personal obligation to pay, only to protect his own interest, furnishes an illustration of the former class of cases. The case of *Jagatdhar Narain Prasad* v. *A. M. Brown* (4), furnishes an illustration of the *second* class of cases; whereas

(1) (1901) 113 Georgia 31; 38 S. E. 374

(2) (1901) 106 Georgia 55, 31 S. E. 794

(3) (1884) L. R. 11 I. A. 126 I. L. R. 10 Calc. 1035.

(4) (1906) I. L. R. 33 Calc. 1133.

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to hold that it is not competent to him to withdraw the order and restore the case to the Court of the Subordinate Judge.

But it is not necessary to rest our decision on this ground alone, because the second and third branches of the contention of the plaintiffs respondents appear to us to be unanswerable. It was contended by the learned vakil for the respondents that, assuming that the District Judge had no power under the law to transfer a case from his Court to that of the Subordinate Judge, this does not really affect the jurisdiction of the latter officer. Under section 18 of Act XII of 1887, the Subordinate Judge unquestionably possessed jurisdiction over the subject matter of the litigation. The only suggestion, which can be plausibly made, is that he assumed that jurisdiction in an irregular manner. The case, therefore, is not one of absolute want of jurisdiction, but is at best of an irregular assumption of jurisdiction. It was argued on behalf of the respondents that, in such a case as this, the appellants, who had never taken this objection at an earlier stage of the proceedings, were precluded from raising the question now.

In our opinion, this distinction is well founded on principle and is amply supported by authority. In *Ledgard* v. *Bull* (1), their Lordships of the Judicial Committee pointed out that, although jurisdiction cannot be conferred by consent where there is an entire absence of jurisdiction, in a case where the Court is competent to entertain the suit, if it were competently brought, the defendant may be barred by his own conduct from objecting to the irregularities in the institution of the suit; and, further, that when a Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator and be bound by his decision on the merits, when these are submitted to him. There are numerous authorities, which establish that, when in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute

(1) (1886) I. L. R. 9 All 191, L. R. 13 I. A. 134 144.

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vakil for the respondents placed reliance upon passages from Sheldon on Subrogation, sections 240-243, which fully bear out his contention, and the position is further strengthened by the expositions contained in Jones on Mortgages, section 874 (6th Edition, Vol. I, page 918), and Harris on Subrogation, sections 792-797. If these doctrines, which appear to us to be based on principles of justice, equity and good conscience, are applied to the case before us, it becomes manifest that the claim put forward on behalf of defendants 5 to 7 is entirely unfounded. When a portion of the money advanced by them was applied in part satisfaction of the interest due on earlier bonds, it could not be said that they were compelled to make the payment to protect an interest of their own in the property mortgaged to them; much less could it be suggested that there was any agreement, express or implied, upon which a claim for subrogation could be founded. There is a second answer, however, as the learned vakil for the respondents has pointed out, to this claim for subrogation. The sums were applied only in part satisfaction of the claim for interest due upon earlier bonds, and it is difficult to appreciate how, under such circumstances, a claim for subrogation could arise. The person, who makes the payment, cannot, by simply paying the interest as it accrues or paying or discharging a portion of the interest, which has already accrued, claim a right of subrogation. He must pay the entire amount of an incumbrance, which is senior to his own This doctrine is based upon a perfectly intelligble principle; for as we have already explained, subrogation is by redemption, and, unless there is redemption, it is not easy to perceive how subrogation can take place, *Merritt* v. *Hosmer* (1), *Street* v. *Beal* (2), *O'Reilly* v. *Holt* (3), *Carter* v. *Neal* (4). It is obvious that the contrary view would lead to endless difficulties It would enable a person, who has made a part payment of the interest due on

(1) (1858) 11 Gray (Mass) 276; 71 Am. Dec. 713.
(2) (1864) 16 Iowa 68; 85 Am. Dec 504.
(3) (1877) 4 Woods C C 645; 18 Fed Cases 792.
(4) (1859) 24 Georgia 346; 71 Am. Dec. 136

nullity may be established, when it is sought to be relied upon in some other proceeding: See Hawes on Jurisdiction, pages 12-16; Hermann on Estoppel, section 110, and *Frankel* v. *Sutterfield* (1).

An entirely different class of questions, however, arises, when it is suggested that a Court in the exercise of the jurisdiction which it possesses, has not acted according to the mode prescribed by the Statute. If such a question is raised, it relates obviously, not to the existence of jurisdiction, but to the exercise of it in an irregular or illegal manner This distinction between elements, which are essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised, is of fundamental importance, but has not always been sufficiently recognised. That the distinction is well-founded is manifest from cases of high authority. Thus, in *Pisani* v. *Attorney-General of Gibraltar* (2), their Lordships of the Judicial Committee held that, where there is jurisdiction over the subject matter, but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived The same principle was adopted in *Exparte Pratt* (3) and *Exparte May* (4), which are authorities for the proposition that where jurisdiction over the subject matter exists requiring only to be invoked in the right way, the party, who has invited or allowed the Court to exercise it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence; see *Vishnu Sakharam Nagarkar* v. *Krishna Rao Malhar* (5) Although the objection that a Court is not given jurisdiction over the subject matter by law, cannot be waived, *Golab Sao* v *Chowdhury Madho Lal* (6), yet defects of jurisdiction arising from irregularities in the commencement of the proceedings, may be waived by the failure to take objection at the proper stage of the proceedings;

(1) (1890) 10 Atlantic Rep 898
(2) (1874) L. R. 5 P. C. 515
(3) (1884) 12 Q B. D. 334
(4) (1884) 12 Q B D 497.
(5) (1886) I. L. R. 11 Bom. 153.
(6) (1905) 2 C. L. J. 384; 9 C. W. N. 956.

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future interest to 6 per cent. per annum. In answer to this contention, it is argued on behalf of the plaintiffs respondents that the compromise in question is inoperative in law, as it was not registered under section 17 of the Registration Act. The facts, so far as a statement of them is necessary for the decision of this point, are not disputed before this Court. It appears that in 1899 the present defendant 14, the mortgagee under the bond of 1886, sued the mortgagors for recovery of interest due at the time of institution of that suit. On the 18th June 1889, a petition of compromise was filed on behalf of the parties. It recited that the plaintiffs had been paid Rs. 100 in cash, that the balance of Rs. 593 was to be paid within the 4th February 1890, and that upon failure to do so, interest would run upon the decretal amount at the rate of 60 per cent. per annum. The compromise further contained a term by which the mortgagee agreed to accept future interest on the entire amount of debt covered by the bond, at the rate of 6 per cent. per annum. This compromise was recited in the preamble to the decree, which was made in that litigation. The decree, however, was based on that portion only of the compromise, which related to the subject-matter of that suit, as is required by section 375 of the Code of Civil Procedure. No decree was made in respect of the covenant by the mortgagee to reduce the claim for future interest to 6 per cent. per annum. Upon these facts, it is contended on behalf of defendants 5 to 7 that the compromise is operative, though not registered, because it was recited in the decree. In support of this position reliance is placed upon the cases of *Bindesri Naik* v. *Ganga Saran Sahu* (1) and *Raghubans Mani Singh* v. *Mahabir Singh* (2). It is argued, on the other hand, by the plaintiffs respondents that the petition of compromise, in so far as it related to matters beyond the scope of the suit, in which it was filed, required to be registered, and this view is sought to be supported by a reference

(1) (1897) I. L. R. 20 All. 171; L. R. 25 I. A. 9.

(2) (1905) I. L. R. 28 All. 78.

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follows that the appellants are precluded from questioning, at the present stage, the validity of the proceedings before the Subordinate Judge The first ground taken on behalf of the defendants 5 to 7 consequently fails and must be overruled

The second ground taken on behalf of defendants 5 to 7 involves the question of *res judicata*, and the *first* ground taken on behalf of the plaintiff raises precisely the same question. But, although the parties are agreed that the decisions in the litigations of 1894 upon the mortgages of 1884 and 1887 operate as *res judicata*, they are not agreed as to the precise effect of those decisions. Defendants 5 to 7 contend that the effect is to preclude the plaintiffs from enforcing their mortgage against the properties purchased by the decree-holders mortgagees in the suits of 1894 The plaintiffs assert, on the other hand, that the effect is to preclude defendants 5 to 7 from setting up their mortgages and thus to place the plaintiffs in the position, which they would have occupied, if the mortgages of 1884 and 1887 had never been created. To determine which of these contentions ought to prevail, we have to examine the circumstances of these two litigations; for as was pointed out by this Court, in the cases of *Surjiram Marwari* v *Barhamdeo Persad* (1) and *Magniram* v. *Mehdi Hossein Khan* (2), to determine the question of *res judicata*, it is essential to ascertain what were the rights in dispute between the parties and what were alleged between them, and this must be done, not merely from the decree, but also from the pleadings and judgment

Now, it appears that defendants 5 to 8 commenced suit No 22 of 1884 to enforce their mortgage of the 15th December 1884, and they instituted suit No 21 of 1894 to enforce their security of the 5th May 1887 In each of these suits they joined as parties defendants, not merely their mortgagors, who are now defendants 1 to 4, but also defendant No. 14, who is the mortgagee of 1886 and is the predecessor in title of the present plaintiffs It will be observed that in the suit to enforce the security of 1884, the mortgagee of 1886 was a necessary party, and an examina-

(1) (1905) 1 C L. J. 337, 349. (2) (1903) I. L. R. 31 Calc 95.

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by the learned Judges of the Allahabad High Court in *Raghubans Mani Singh* v. *Mahabir Singh* (1) is well founded, litigants may, as was pointed out in *Birbhadra Rath* v. *Kalpataru Panda* (2), evade with impunity the provisions of the Registration Act, the Stamp Act, the Court-fees Act and the Civil Courts Act, which last defines the jurisdictions of different classes of Courts. We are unable to persuade ourselves to hold that this is what was intended by their Lordships of the Judicial Committee. It has not been disputed, and it cannot be disputed, that the petition of compromise in question purported to extinguish title to or interest in immoveable property of a value exceeding Rs. 100. We must consequently hold that it is inoperative, because it was not registered. The fourth ground taken on behalf of defendants 5 to 7 cannot consequently be supported.

The first ground taken on behalf of the plaintiffs respondents, who have preferred a separate appeal, relates to the question of *res judicata*, and has already been disposed of in connection with the second ground taken on behalf of defendants 5 to 7.

The second ground taken on behalf of the plaintiffs raises the question, whether defendants 5 to 7 would not be bound to account for the profits received by them during their possession of the mortgaged properties after their purchase at the execution sale, and whether these defendants are entitled to have interest at the contract rate specified in their securities, calculated after the dates of their respective decrees. Both these contentions would seem to be well founded, and it is sufficient to refer to the case of *Ganga Das Bhattar* v. *Jogendra Nath Mitra* (3), which is entirely in accord with the decision of their Lordships of the Judicial Committee in *Kedar Lal Marwari* v *Bishen Pershad* (4). It is not necessary, however, to deal with this point in detail because, as we have already held,

(1) (1905) I. L. R. 28 All. 78.
(2) (1905) 1 C. L. J. 388.
(3) (1907) 5 C. L. J. 315.
(4) (1903) L. R. 31 I. A. 57; I. L. R. 31 Calc. 332.

in satisfaction of interest due upon earlier bonds of the 15th December 1884, the 29th March 1885, and the 2nd June 1885; but there was no express prayer that in respect of this sum, the mortgage, though of 1887, might be treated as entitled to priority over the mortgage of 1886. The mortgagee of 1886 defended the suit on the ground that there was no valid cause of action as against him, and also asserted that the mortgage bond, on which the claim was founded, was collusive and without consideration. Upon these pleadings, the Subordinate Judge framed issues, one of which was, whether the bond in suit was genuine and *bona fide*, and another was, whether the plaintiffs had any cause of action against the mortgagee of 1886. There was no issue raised as to whether the bond of 1887, if genuine, was, in respect of a portion of the consideration money, entitled to priority over the bond of 1886. The Subordinate Judge found upon the evidence that there was nothing to show whether the alleged mortgagee of 1886 was really interested in the property in suit. He also held that there was no reliable evidence to prove the claim against them. In this view of the matter, he dismissed the suit against the mortgagee of 1886, but made a decree against the mortgagors on confession of judgment. The decree directed the sale of the properties included in the mortgage so far as the mortgagors were concerned The mortgagees subsequently executed this decree and purchased the property at the execution sale Upon these facts, the learned vakil for defendants 5 to 7, the mortgagees of 1884 and 1887, contends that the present plaintiffs, whose predecessor, the mortgagee of 1886, was a party defendant to the suits of 1894, are precluded by the doctrine of *res judicata* from setting up the mortgage of 1886 In support of this position reliance is placed upon the cases of *Srigopal* v. *Pirthi Singh* (1) and *Gopal Lal* v. *Benarasi Pershad Choudhry* (2).

It is argued on the other hand by the learned vakil for the plaintiffs that as the suits of 1884 were dismissed as against

(1) (1902) L. R. 29 I. A. 118, I. L. R. 24 All. 429.

(2) (1904) I. L. R. 31 Calc. 428.

APPELLATE CIVIL.

Before Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Ryves.

SATISH CHANDRA MUKHERJEE*

1908
June 30.

v.

PORTER.

Setting aside sale, application for—Agreement with a co-lessee debtor and the decree-holder—Dissuading purchaser from Procedure Code (Act XIV of 1882), ss. 244, 311. or s. 100.

An agreement with the co-lessee of the judgment- because it holder that he would purchase the property and th on behalf of for the amount of his decree, in consequence of pported. from bidding at the sale, is not by itself sufficier

Mahomed Mira Ravuthar v. Savvasi Vij plaintiffs respon- plained and followed. *Woopendro Nath Si* eal, relates to the distinguished. been disposed of in

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APPEAL by the decree-holder,

The appellant in this case obtai the plaintiffs raises against Colonel A. R. Porter, the ld not be bound to execution of the said decree, the ring their posses- brought to sale the house of the Hon purchase at the longing to Colonel Porter and himself are *entitled* to for Rs. 5,685. Colonel Porter applied to heir securities, Judge of Alipore to have the sale set as decrees. Both amongst which may be mentioned non led, and it is of attachment and sale proclamation, ar v. *Jogendra* the direct result of fraud. The alleg the decision of Colonel Porter contended vitiated th *dar Lal Mar-* Evennett, the partner in the business of however, to dissuaded from bidding at the sale by the lready held,

* Appeal from Original Order, No. 222 of 1906, a by C. T. Beachcroft, District Judge of 24-Parganas, da

(1) (1899) I. L. R. 23 Mad. 227; L. R. 27 I. A. 17. I. R. 31

(2) (1881) I. L. R. 7 Calc. 346.

so far as the security of 1884 was concerned, although the mortgagee of 1886 was a proper and necessary party, the suit to enforce the claim was unsuccessful by reason of the failure of the mortgagees of 1884 to establish the genuineness of the security as against the mortgagee of 1886. Under these circumstances, it is impossible to hold that merely because the mortgagee of 1886 failed to establish his security in the suits of 1894, such failure in any way precludes him or his representative from now relying on his title under the mortgage

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GURDEO SINGH v. CHANDRIKAH SINGH AND CHANDRIKAH SINGH v. RASHBEHARY SINGH.

MOOKERJEE J.

The decrees of dismissal, which were made in the suits of 1894, were decrees, which were based on the finding that the mortgages of 1884 and 1887 were not proved to be genuine and for consideration as against the mortgagee of 1886. That finding, therefore, clearly operates as *res judicata* in favour of the mortgagee of 1886. The decrees, which were made, were in accordance with and based on this finding, see *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (1).

On the other hand, the finding that there was no evidence to show that the alleged mortgagee of 1886 was in any way interested in the mortgaged premises, could not be taken as the basis of the judgment of the Court The decrees might be said to be decrees in spite of that finding, and when the suits were dismissed as against the mortgagee of 1886, it was not open to him to challenge, by way of appeal, the finding of the Subordinate Judge upon the question of the validity of his mortgage. In this view of the matter, that finding does not in any way operate as *res judicata* See *Run Bahadur Singh* v. *Lucho Koer* (2), *Nundo Lall Bhuttacharjee* v *Bidhoo Moolhy Debee* (3), *Thakur Magundeo* v *Thakur Mahadeo Singh* (4), *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (1) and *Concha* v. *Concha* (5).

We are not unmindful that in a litigation between the present defendants 9 to 12 on the one hand as plaintiffs, and defendants 1 to 4 (as mortgagors),

(1) (1897) I. L. R. 24 Calc. 900.
(2) (1884) I. L. R. 11 Calc. 301, 306.
(3) (1886) I. L. R. 13 Calc. 17.
(4) (1891) I. L. R. 18 Calc. 647.
(5) (1886) L. R. 11 App. Cas. 541, 552

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on to say that "On account of non-publication of the sale, there were no *bona fide* bidders at all and although your petitioner's co-sharer Mrs. Evennett was present on the first day of the sale, and she and the decree-holder bid against each other on the second day she desisted from bidding any further, and the petitioner believes that she was dissuaded by the decree holder from bidding any further." In consequence of all these circumstances it was alleged that the property had been sold at a grossly inadequate price.

The lower Court has found on the evidence and we agree with that finding that there is no reason to suppose that the attachment of the property and service of the sale proclamation were not duly made. The property in question is a leasehold of some 17 bighas situated at some distance from Ballygunge in a lonely and jungly locality and belonged to the judgment-debtor and Mrs. Evennett, who carried on a farming business upon it. The judgment-debtor had erected buildings upon the property and had expended a considerable amount of money in so doing. The decree-holder's decree at the time of the application for sale amounted to Rs. 5,697-7-9 pies. The money was due for materials supplied to the judgment-debtor for the erection of some of these farm buildings. There were other decrees also outstanding on similar accounts. The lease had two years to run at a monthly rental of Rs. 50 with the stipulation that, if the rent was not paid for two months, the lease should terminate; and there was a clause in it under which the lessees had the option to buy the property for Rs. 15,000, and if they failed to exercise this option, the buildings that had been erected would become the property of the lessor. It appears that Rs. 15,000 was not a cheap price for this piece of land, which, from its locality and nature, is unsuitable for anything but farming purposes, which had not in the past proved very successful. It is not easy therefore to estimate the market value of the judgment-debtor's share in the lease. On the first day of the sale it appears that Mrs. Evennett made a bid of Rs. 5,630. This was the highest bid on that occasion. It was, however, not accepted

tion is, are the defendants 5 to 8 entitled, after their defeat in the litigations of 1894, to enforce their mortgages of 1884 and 1887 against the mortgagee of 1886? If they are not, and if their remedy was by way of an appeal against the adverse decisions of 1894, they are obviously precluded from falling back upon their mortgages of 1884 and 1887 The effect of their purchase in execution of their own decrees has been to give them a title against their mortgagors alone, and as the suits, in which these decrees were made, were dismissed against the mortgagee of 1886, they have not obtained a valid title against him or his representative in interest. The Subordinate Judge was, *in our opinion*, clearly in error in this matter. He proceeded on the assumption that the effect of the dismissal of the suits of 1894 was to leave the parties in the position, which they would have occupied, if the mortgagee of 1886 had never been joined as a party defendant in those suits. This view is obviously unsound The mortgagee of 1886 was brought before the Court; he challenged the validity of the mortgages of 1884 and 1887, as he was entitled to do, and his resistance was successful Under these circumstances, the conclusion appears to be irresistible that the present plaintiffs may rightly claim the full benefit of the dismissal of the suits of 1894 and are entitled to enforce their security against the properties in the hands of defendants 5 to 8, precisely as if the mortgages of 1884 and 1887 had no real existence. The second ground advanced on behalf of defendants 5 to 8 must be overruled, and the first ground taken on behalf of the plaintiffs must consequently prevail.

The third ground taken on behalf of defendants 5 to 7 raises the question, whether they are not entitled to priority over the mortgage of 1886, which the plaintiffs seek to enforce, in respect of the sum of Rs 1,952, which formed part of the consideration of their mortgage of 1887. It is established by the evidence that out of the sum advanced by defendants 5 to 7 upon the mortgage of 1887, Rs. 100 was paid in satisfaction of the interest due upon a prior mortgage of the 15th December 1884 executed in favour of persons now represented by

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partner's absence to buy his share as cheaply as she could and to effect this, came to an understanding with the decree-holder. Then quoting a passage from the judgment of the Privy Council in *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (1), he held that this arrangement was in itself sufficient to vitiate the sale and consequently he ordered it to be set aside.

It appears to us that the learned Additional Judge has misapplied the ruling of the Privy Council. The ruling on which he relies is *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (1). The facts of that case are set out in *Jayinilabdin Ravuttan* v. *Vijia Ragunadha Ayyarappa Maiken Gopaliar* (2) and are very similar to the facts found in this case. In that case, the judgment-debtor was a minor under the Court of Wards. His property worth Rs. 1,50,000 was put up for sale under two mortgage decrees. The principal judgment-debtor obtained leave to bid at the sale and had previously entered into a written agreement with one Papanad Zemindar to purchase the property himself and sell it to Papanad Zemindar for Rs. 85,000, and it was agreed between them that the Zemindar should dissuade other persons from bidding at the auction. It was found that the Zemindar had dissuaded persons from bidding and the decree-holder himself bought the property for Rs. 78,000. The application to set aside that sale further alleged that the sale took place before the expiration of 30 days from the date on which the sale-notice had been published, that as a matter of fact the proclamation of sale had not been published in the villages and that the petitioner's interest in the villages had not been properly described.

The Court of first instance held that this contract vitiated the sale. On appeal, the High Court of Madras held that this in itself was not enough to set aside the sale. It, however, set aside the sale on another ground, namely, that the decree-

(1) (1899) I. L. R. 23 Mad. 227; L. R. 27 I. A. 17.
(2) (1890) I. L. R. 19 Mad. 315.

tion is, are the defendants 5 to 8 entitled, after their defeat in the litigations of 1894, to enforce their mortgages of 1884 and 1887 against the mortgagee of 1886? If they are not, and if their remedy was by way of an appeal against the adverse decisions of 1894, they are obviously precluded from falling back upon their mortgages of 1884 and 1887. The effect of their purchase in execution of their own decrees has been to give them a title against their mortgagors alone, and as the suits, in which these decrees were made, were dismissed against the mortgagee of 1886, they have not obtained a valid title against him or his representative in interest. The Subordinate Judge was, in our opinion, clearly in error in this matter. He proceeded on the assumption that the effect of the dismissal of the suits of 1894 was to leave the parties in the position, which they would have occupied, if the mortgagee of 1886 had never been joined as a party defendant in those suits. This view is obviously unsound The mortgagee of 1886 was brought before the Court; he challenged the validity of the mortgages of 1884 and 1887, as he was entitled to do, and his resistance was successful Under these circumstances, the conclusion appears to be irresistible that the present plaintiffs may rightly claim the full benefit of the dismissal of the suits of 1894 and are entitled to enforce their security against the properties in the hands of defendants 5 to 8, precisely as if the mortgages of 1884 and 1887 had no real existence. The second ground advanced on behalf of defendants 5 to 8 must be overruled, and the first ground taken on behalf of the plaintiffs must consequently prevail.

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Now, in this case, Mrs. Evennett obtained no benefit whatever from the sale. At the utmost, she refrained from making a bid because probably she hoped that she would obtain the property more cheaply from the decree-holder, but there was no duty on her to bid at all and, on her own showing, the agreement was that she could get the *property* on payment of the amount of the decree-holder's decree, which she herself stated was between Rs. 5,830 and Rs. 6,000.

We, therefore, think that there was no fraud on the part of the decree-holder, which would justify us in setting aside the sale. There are no other grounds for setting aside the sale. We, therefore, set aside the order of the Court below and decree the appeal with costs.

Appeal decreed.

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Srigopal v. *Pirthi Singh* (1), *Mahabir Pershad Singh* v. *Macnaghten* (2), *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (3). It is not necessary, however, to rely upon this ground, as a question might arise as to whether the doctrine of constructive *res judicata* is applicable where the subject-matters of the two suits are different: *Surjiram Marwari* v. *Barhamdeo Persad* (4). We are satisfied, however, that the second branch of the contention of the learned vakil for the respondent must be sustained. That contention, in substance, is *two-fold*, namely, *first*, that the doctrine of subrogation entitles a person to the benefit of a mortgage in favour of a stranger, either when he is compelled to pay it off to protect an interest of his own in the property mortgaged or by an agreement, and *secondly*, that in any event, the entire amount of a senior encumbrancer must be paid before subrogation can be claimed

The first of these points raises the question of the nature of subrogation and the principle on which it is founded. That principle is thus explained by Mr. Justice Sutherland in *Ellisworth* v. *Lockwood* (5) "Subrogation or substitution by operation of law to the rights and interests of the mortgagee in the land is by redemption, and redemption is payment of the mortgage debt after forfeiture by the terms of the mortgage contract, so that really the subrogation or substitution by operation of law arises or proceeds on the theory that the mortgage debt is paid If the holder of a bond assigned it to a party claiming a right to redeem, the latter is subrogated by the assignment to the mortgage debt and mortgage security and to the instrument evidencing such debt and security, and there is no room or occasion for subrogation by operation of law." Consequently, it may be said, in general, that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor

(1) (1902) L. R. 29 I. A. 118; I. L. R. 24 All. 429

(2) (1889) L. R. 16 I. A. 107; I. L. R. 16 Calc. 682

(3) (1892) L. R. 19 I. A. 234; I. L. R. 20 Calc. 79

(4) (1905) 1 C. L. J. 337, 353.

(5) (1870) 42 N. Y. 89.

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at the sale, that of itself is a sufficient ground why the purchase should be set aside." With reference to these remarks, their Lordships of the Privy Council said that the dictum was too sweeping in its terms. At the same time they pointed out that the decision of the Calcutta High Court in itself was correct, because the decree-holder there was acting in concert with and partially for the benefit of one, who stood in a fiduciary relation to the infant debtor, and there was clearly a conflict between their duty and their interest.

Now, in this case, Mrs. Evennett obtained no benefit whatever from the sale. At the utmost, she refrained from making a bid because probably she hoped that she would obtain the property more cheaply from the decree-holder, but there was no duty on her to bid at all and, on her own showing, the agreement was that she could get the property on payment of the amount of the decree-holder's decree, which she herself stated was between Rs. 5,830 and Rs. 6,000.

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Appeal decreed.

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the decision of their Lordships of the Judicial Committee in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (1) shows, the line dividing the class of cases, where no bargain is made when the money is advanced, and cases where the money is advanced on the understanding that the creditor should be subrogated to the position of the mortgagee. It is only in the first class of cases that the question of intention to keep the mortgage alive arises. The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or properties of his own. This doctrine is nowhere more clearly and concisely expounded than in the judgment of the Supreme Court of the United States in *Etna Life Insurance Company* v. *Middleport* (2), where the principle laid down by Chancellor Johnson in *Gadsden* v. *Brown* (3) and by Chancellor Walworth in *Sandford* v. *McLean* (4) was adopted as well founded on reason. That principle is, that subrogation as a matter of right is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor for the benefit of a third person takes place only for his benefit, who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser, who extinguishes the encumbrances upon his estate, or of a co-obligor or surety, who discharges the debt, or of an heir, who pays the debts of the succession, *Shin* v. *Budd* (5). Any one, who is under no legal obligation or liability to pay the debt, is a stranger, and, if he pays the debt, he is a mere volunteer, *Arnold* v. *Green* (6). To the same effect are the decisions in *Crippen* v. *Chappel* (7), *Hough* v. *Etna Life Insurance Company* (8) and *Watson* v. *Wilcox* (9). The learned

(1) (1901) L. R. 29 I. A. 9, I. L. R. 29 Calc. 154.
(2) (1887) 124 U. S. 525.
(3) (1843) Speers, Eq. (S. C.) 37.
(4) (1832) 3 Paige N. Y. 122.
(5) (1862) 14 N. J. Eq. 234.
(6) (1889) 116 N. Y. 566.
(7) (1886) 35 Kansas 495; 57 Am. Rep. 187.
(8) (1870) 57 Ill. 318, 11 Am. Rep. 18.
(9) (1876) 39 Wis. 643, 20 Am. Rep. 63.

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Appeal decreed.

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a mortgage security, to claim subrogation; would he then occupy the position of a joint mortgagee with the person whose claim is partially satisfied? What would be his position with regard to interest subsequently accruing upon the prior mortgage, and how are the rights to be worked out if, as in the case before us, the prior mortgagees have already sued and enforced their security? The rule, therefore, that before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied, so that he shall be relieved from all further trouble, risk and expense, is based upon good-sense and ought to be adopted as applicable to the case before us, Sheldon on Subrogation, sections 14, 19, 25, 70 and 83; Harris on Subrogation, section 29 To use the language in *Hollingworth* v. *Floyd* (1) "it would not subserve the ends of justice to consider the assignment of an entire debt to a surety as affected by operation of law, when he had paid but a part of it and still owed a balance to the creditor, and the Court would not countenance such an anomaly as a *pro tanto* assignment, the effect of which would only be to give distinct interests in the same debt to both creditor and surety" This view is in no way inconsistent with that taken by the learned Judges of the High Court in *Lomba Gomaji* v *Vishvanath Amrit Tilvankar* (2). On the grounds, therefore, that the position of defendants 5 to 7 did not entitle them to claim the benefit of the principle of subrogation, and that partial payment was not sufficient to entitle them to succeed to the rights of the prior encumbrancer by subrogation, we must overrule the third ground upon which the decision of the Subordinate Judge is sought to be assailed.

The fourth ground, upon which the decision of the Subordinate Judge is challenged on behalf of defendants 5 to 7 is that the plaintiffs are not entitled to claim interest at the rate specified in the mortgage of 1886, inasmuch as on the 18th June 1889, they entered into a compromise with their mortgagors, by which they undertook to reduce their claim for

(1) (1807) 2 Harris & Gill (Maryland) 91 (2) (1893) I. L. R. 18 Bom '86

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VULCAN IRON WORKS v. BISHUMBHUR PROSAD.

FLETCHER J.

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GURDEO SINGH v. CHANDRIKAH SINGH AND CHANDRIKAH SINGH v. RASH BEHARY SINGH.

MOOKERJEE J.

to the cases of *Pranal Anni* v. *Lakshmi Anni* (1), *Muthayya* v. *Venkataratnam* (2), *Birbhadra Rath* v. *Kalpataru Panda* (3) and *Patha Muthammal* v. *Esup Rowther* (4). In our opinion, the contention advanced on behalf of the plaintiffs respondents is well founded and must prevail The point is really concluded by the decision of their Lordships of the Judicial Committee in *Pranal Anni* v. *Lakshmi Anni* (1), the true effect of which was explained in *Birbhadra Rath* v. *Kalpataru Panda* (3) After a careful examination of all the authorities on the subject, we adopt the view put forward in that case. A petition of compromise, in so far as it relates to properties in suit, does not require registration under section 17 of the Registration Act, and the decree, in so far as it gives effect to the settlement touching such properties, operates as *res judicata*. If it gives effect, however, to the settlement touching properties extraneous to the litigation, the decree is, to that extent, clearly without jurisdiction and is inoperative In relation to these extraneous properties, the parties must fall back upon the petition itself, which cannot, without registration, effectively declare or create title to immoveable property exceeding Rs 100 in value The same view was adopted by this Court in the case of *Kali Charan Ghosal* v *Ram Chandra Mandal* (5) The case of *Raghubans Mani Singh* v. *Mahabir Singh* (6), upon which much stress was laid on behalf of the appellants, appears to be based upon a misapprehension of the judgment of their Lordships of the Judicial Committee in *Pranal Anni* v *Lakshmi Anni* (1). With all respect for the learned Judges, who decided that case, we find ourselves entirely unable to adopt their view, and we are supported in our conclusion by the decision of the Madras High Court in *Patha Muthammal* v. *Esup Rowther* (4), *Muthayya* v. *Venkataratnam* (2) and *Achuta Ram Raja* v *Subbaraju* (7). If the view adopted

(1) (1899) L R 26 I A 101, I L R 22 Mad 508
(2) (1901) I L.R. 25 Mad 551
(3) (1905) 1 C. L. J. 388
(4) (1906) I L. R. 29 Mad. 365
(5) (1903) I. L. R. 30 Calc. 783.
(6) (1905) I. L. R. 28 All. 78.
(7) (1901) I. L. R. 25 Mad. 7.

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Farruckabad to stay all proceedings in the suit before it, pending the determination of the present suit.

This motion therefore fails. The plaintiffs must pay the costs of the motion.

Attorney for the plaintiffs : *Wilson & Co.*

Attorney for the defendant : *P. C. Law.*

R. C. M.

defendants 5 to 7 are not entitled to rely upon their mortgages of 1884 and 1887 as against the mortgage of 1886, which the plaintiffs seek to enforce. The plaintiffs are entitled to enforce their security precisely in the same manner as if the mortgages of 1884 and 1887 had never been created.

The only point taken on behalf of defendants 9 to 12 raises the question, whether they are not entitled to their costs in the Court of first instance as well as in this Court. It is manifest that the case of the plaintiffs as against them has entirely failed and the learned vakil for the plaintiffs has not seriously resisted the claim for costs put forward on behalf of defendants 9 to 12.

The result, therefore, is that Appeal No. 540 of 1904 preferred by defendants 5 to 7 fails, and must be dismissed. Appeal No. 566 of 1904 preferred by the plaintiffs must be allowed, and the decree of the Subordinate Judge modified to this extent, namely, the words " subject to the prior mortgage charge of the defendants 5 to 8 and " and " the mortgage decree of the defendants Nos. 5 to 8 and " shall be expunged. The cross objection of defendants 9 to 12 must also be allowed, and they will be entitled to their costs in the Court below. So far as the costs of this Court are concerned, defendants 5 to 7 must pay the costs of the plaintiffs respondents in Appeal No. 540 of 1904, and the plaintiff appellants in Appeal No. 566 of 1904 must pay the costs of defendants 9 to 12 Only one decree will be drawn up in the two appeals, and, to avoid future difficulties, the decree must be self-contained without any reference to the decree of the Subordinate Judge.

HOLMWOOD J. I concur.

Decree modified.

S. C. G.

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Dassi obtained possession of Government securities for Rs. 48,000 which stood in the name of the testator by means of a forged endorsement from the District Court of Faridpur. The plaintiffs and the administrator *pendente lite* made every effort to trace the missing securities, and from the 25th November 1904 from time to time wrote to the Public Debt Office at Calcutta, informing them of the loss of the securities and the circumstances, of such loss and requesting them to stop the securities, but the Public Debt Office refused to give any information regarding them when the securities were from time to time presented to them for renewal under forged indorsements.

The plaintiffs in their plaint submitted that the Public Debt Office wrongfully threw great obstacles in the way of the plaintiffs and the administrator *pendente lite* and prevented them from getting any information regarding these securities, but on or about the 26th March 1906 the plaintiffs came to learn from a letter written by the Public Debt Office to the Officiating District Judge of Faridpur, that the securities for Rs. 48,000 had been cancelled by renewal. Immediately the administrator *pendente lite* applied for information to the Public Debt Office for the numbers of the renewal notes and for the names and residences of the person or persons in whose favour the notes had been transferred successively, and for the dates of such transfer, but the Public Debt Office declined to give any information whatever, unless the administrator *pendente lite* executed a bond for Rs. 3,852 with approved sureties not to sue them in respect of any of the notes. This the plaintiffs declined, and further submitted that the testator was a holder in due course of the securities in question at the time of his death, and that, as they were his executors, they were entitled to hold the securities, and contended that the Public Debt Office had acquired no title to the securities and had wrongfully destroyed them, which action deprived the plaintiffs of their value.

The plaintiffs also submitted that in the alternative the Public Debt Office had failed to pay the sum secured by the notes, although called upon by the plaintiffs to do so, and they

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Satish Chandra Mukerjee v. Porter

The learned District Judge held on the evidence that there was ample proof of the publication of the writ of attachment and the sale proclamation and the price fetched at the sale was adequate. He, however, held on the authority of *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (1) that the agreement between Mrs. Evennett and the decree-holder amounted to a conflict between the duty and the interest of the decree-holder and the judgment-debtor and was sufficient to vitiate the sale.

failed a... *Hara Prasad Chatterji (Babu Shoshee Shikhar Basu*
resisted the ... r the appellant. The District Judge has mis-
dants 9 to 12. ... case of *Mahomed Mira Ravuthar* v *Savvasi*
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ferred by defendant... *oopendro Nath Sircar* v *Brojendro Nath*
No. 566 of 1904 prefe... cable. Mrs. Evennett is not the pur-
and the decree of the Su...
tent, namely, the words "s... respondent.
of the defendants 5 to 8 a... *Cur. adv vult.*
the defendants Nos. 5 to ...
cross objection of defendan... s J. This appeal arises out of an
and they will be entitled to ...rict Judge of Alipore setting aside
So far as the costs of this C...ree under the provisions of sections
to 7 must pay the costs of t... Procedure Code The judgment-
No. 540 of 1904, and the... stated that there had been no attach-
of 1904 must pay the ...sold, that the decree-holder fraudulent-
decree will be drawn ...sed the suppression of the service of the
future difficulties, th... the property sold and that no sale-pro-
any reference to the ...erved on the property and that the decree-
HOLMWOOD J. I co... auction-purchaser, with fraudulent in-
...ated the value of the property and pur-
S. C. G. ...th a view to cause wrongful loss to the
...ngful gain to himself, from mentioning
...etitioner in the property sold. These are
...s of fraud. The petitioner, however, went

I. L. R. 23 Mad. 227; L. R. 27 I. A. 17.
(1) I. L. R. 7 Calc. 316.

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BANKU BEHARI SIKDAR v. SECRETARY OF STATE FOR INDIA.

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The plaintiffs have failed to show that some of the signatures endorsed are not genuine. The onus is upon the plaintiffs to show that the endorsed signatures are genuine. If they do not show that the endorsement is not genuine, then the presumption is that it is a genuine endorsement. The question of proof is under section 9 of the Negotiable Instruments Act. The plaintiffs cannot presume forgery, they must show that the endorsement is a forgery [Fletcher J. Directly the plaintiff shows the notes were stolen, the onus shifts to you.] I have to show I was a holder in due course no doubt, and section 9 of the Negotiable Instruments Act protects me, if I deal with the matter in due course and pay full value.

Mr. B. C. Mitter (*Mr. Dunne* and *Mr. Mullick* with him) for the plaintiffs. The case of the *Bank of Bengal* v. *Mendes.* (1) is an express case in point. [Fletcher J. The words in section 9 'without having sufficient cause to believe that any defect existed' means, as in English law, without notice.] That is so, but section 58 shows that, once I prove the endorsement is fraudulent, the onus shifts to the defendant to show that he is a *bonâ fide* holder without notice. *Kennedy* v. *Thomas* (2), *Ganesdas Ramnarayan* v. *Lachminarayan* (3) and *Rai Bahadur Sahu Lalta Persud* v. *Charles Campbell* (4). This case is governed by section 118, clause 9 of the Negotiable Instruments Act. See also section 10. I am entitled to succeed in tort and in contract for the full amount at the rate of the conversion, and I claim to be entitled to compensation.

FLETCHER J. The plaintiffs, who are the executors of one Gouri Prosad Kundu deceased, seek by this suit to recover against the defendant, the Secretary of State for India in Council, the value of certain Government Promissory Notes of the face value of Rs 48,000 under the circumstances hereafter stated.

The deceased Gouri Prosad Kundu, whose native village was Gopalbari in the District of Faridpur, had for some years

(1) (1880) I. L. R. 5 Calc. 654.
(2) [1894] 2 Q. B. 759.
(3) (1894) I. L. R. 18 Bom. 570.
(4) (1905) 9 C. W. N. 841.

and the property was put up again the next day, when it was knocked down to the decree-holder for Rs. 5,685.

Mrs. Evennett, in her evidence, stated that she came intending to bid on the second day and was ready to bid up to Rs. 6,000, that she did not do so because the decree-holder's pleader asked her not to bid, and an agreement was come to between them that the decree-holder should sell her the property for the amount of his decree, and that, relying on this assurance of the decree-holder's pleader, she did not bid. She admitted in her cross-examination that she thought that the decree-holder wanted to bid up to his claim He told her that he would settle it for less with her; he said he would be reasonable and so she asked him to let her pleader know the lowest amount he would take and to write to her on the subject That was before the sale on the second day She thought the decree was for Rs. 5,830; it was not over Rs. 6,000. She further stated that she offered the decree-dolder Rs 3,000 after the sale. The decree-holder himself also gave evidence He denies that he had any talk with Mrs Evennett before the sale. He says "After the sale was over, Mrs Evennett asked me whether I could return to her the property sold I said I could return it, if the decretal amount was paid to me I said I could return it, if I got Rs. 5,700 decreed by this Court and nearly Rs. 140—the costs of the High Court" This is all the material evidence as to what happened.

On these materials, the lower Court has found that Mrs. Evennett was willing to bid up to Rs 6,000 It says.— "Taking her evidence with that of the decree-holder I think there must have been some understanding between them that they would not bid against each other, but that she would get the property back for the amount of the decree" Accepting this finding which is the most favourable to the judgment-debtor that can be arrived at, in our opinion it would not be sufficient to justify, as the lower Court rightly held, the setting aside of the sale. The lower Court, however, has gone on to hold that Mrs. Evennett was in a fiduciary relation to the judgment-debtor and was taking advantage of her

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Notes. This being so, it follows that any blank ... which were on the notes for Rs. 56,000 at the date of the de-ceased's death, must have been placed thereon after the ... June 1904, because the Public Debt Office will not pay ... on Government Promissory Notes, when they are endorsed ... blank. The amount realised for interest on the Notes for Rs. 56,000 was at or about the time the interest was drawn ... by the deceased in the purchase of Government Promissory Notes of the face value of Rs. 5,000.

It is admitted by the plaintiffs that after the date on which the interest was drawn the deceased pledged Government Promissory Notes of the face value of Rs. 2,000 with the said firm of Roy to secure the advance of two sums of Rs. 900 each required for the purpose of the deceased's rice-business. These Notes were redeemed by the deceased on the 16th July 1904. It appears from the evidence that, whenever the deceased used to require money for the purpose of his business, he used to borrow it from the said firm of Roy on the pledge of his Government Promissory Notes. This is shown by the evidence of the cashier of the firm, who produces the books showing many transactions between his firm and the deceased. The only transaction between this firm and the deceased after the 15th June 1904 was the borrowing by the deceased of the two sums of Rs. 900 mentioned above. One of the witnesses for the defendant, who was formerly employed in the deceased's rice-business, stated in his evidence that the deceased used to borrow money on pledge of the Government Promissory Notes from firms other than the said firm Roy. This witness was, however, unable to state the names of any such other firm or the nature or amount of such transaction, and it would appear also that he was not on good terms with the plaintiffs.

The deceased, as I have already stated, died on the 22nd August 1904.

Accordingly I hold on the evidence that at the date of the deceased's death all the Government Promissory Notes for Rs 56,000 and Rs 5,000 were in his possession.

and the property was put up again the next day, when it was knocked down to the decree-holder for Rs. 5,685.

Mrs. Evennett, in her evidence, stated that she came intending to bid on the second day and was ready to bid up to Rs. 6,000, that she did not do so because the decree-holder's pleader asked her not to bid, and an agreement was come to between them that the decree-holder should sell her the property for the amount of his decree, and that, relying on this assurance of the decree-holder's pleader, she did not bid. She admitted in her cross-examination that she thought that the decree-holder wanted to bid up to his claim He told her that he would settle it for less with her; he said he would be reasonable and so she asked him to let her pleader know the lowest amount he would take and to write to her on the subject. That was before the sale on the second day. She thought the decree was for Rs. 5,830; it was not over Rs. 6,000. She further stated that she offered the decree-dolder Rs. 3,000 after the sale. The decree-holder himself also gave evidence. He denies that he had any talk with Mrs Evennett before the sale. He says "After the sale was over, Mrs Evennett asked me whether I could return to her the property sold. I said I could return it, if the decretal amount was paid to me I said I could return it, if I got Rs. 5,700 decreed by this Court and nearly Rs. 140—the costs of the High Court" This is all the material evidence as to what happened

On these materials, the lower Court has found that Mrs Evennett was willing to bid up to Rs 6,000. It says.— "Taking her evidence with that of the decree-holder I think there must have been some understanding between them that they would not bid against each other, but that she would get the property back for the amount of the decree" Accepting this finding which is the most favourable to the judgment-debtor that can be arrived at, in our opinion it would not be sufficient to justify, as the lower Court rightly held, the setting aside of the sale The lower Court, however, has gone on to hold that Mrs. Evennett was in a fiduciary relation to the judgment-debtor and was taking advantage of her

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It will, however, be convenient before proceeding further to set out the rules framed by the Bank of Bengal with reference to the stoppage of Government Promissory Notes—such rules are as follows :—"The stoppage of notes is effected by a written application addressed to the Public Debt Office containing a correct description of the loans, numbers and amounts of the notes to be stopped. The address of the applicant should also be given in full. On presentation at the Public Debt Office of any of the notes so stopped, notice of presentation is promptly given requiring the production of an order of a competent Court within ten days from the date of notice for the further detention of the notes by the Public Debt Office, failing which the stoppage is removed against the notes presented, which are then dealt with as though no stoppage had been entered against them.

"In the case of notes stopped by residents in the mofusil or at any great distance from Calcutta, the period allowed for the requisite order of Court is extended to 15 or 20 days according to the circumstances. Steps should be taken to identify the presenter of a stopped note and his address should be registered in case of need."

These rules approximate to the practice of the Bank of England and other public Companies in England with reference to distringas notices, and it cannot be doubted, if the Public Debt Office had acted in accordance with these rules, this case would never have arisen.

On the 25th November, a few days after the application for probate in the Court at Faridpur, the plaintiff's attorneys in Calcutta wrote to the Bank of Bengal a letter in the following terms :—

"Estate Gouri Prosad Kundu deceased."

"The above named deceased died on the 22nd August last possessed of the following Government Promissory Notes and leaving a will, whereby he appointed our clients Babus Banku Behari Sikdar and Parmessur Sikdar executors. Our clients have applied for probate of the will and expect to obtain the same shortly. The deceased has not endorsed or transferred

holder, when he applied for leave to bid, had suppressed from the knowledge of the Court the fact that he had entered into such an agreement with Papanad Zemindar, and that this suppression of fact amounted to fraud upon the Court, entitling the judgment-debtor to say that, in point of law, no leave to bid was granted. Their Lordships said that "the case was one in which there was a duty incumbent upon the appellant to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid. Without such disclosure, it is impossible for the Court to exercise its discretion."

On appeal to the Privy Council, this judgment was set aside and the sale was affirmed.

The learned Additional Judge relies on a passage in the Privy Council judgment to be found on pages 232 and 233, namely, "the decree-holder was acting in concert with, and partially for the benefit of, one who stood in a fiduciary relation to the infant-debtor; and there was clearly a conflict between their duty and their interest." Those remarks refer to a dictum of the Judges of the High Court of Calcutta in *Woopendra Nath Sircar* v. *Brojendro Nath Mundul* (1). The facts of that case are very different. There the decree-holder sought to sell the property belonging to a minor, who was under the guardianship under the Court of Wards of one Radha Mohan, who was the uncle of the decree-holder and lived jointly with him. In that case it was proved that the agent of Radha Mohan, the manager of the infant judgment-debtor, dissuaded persons from bidding at the sale with the result that the decree-holder himself bought the property at a cheap price to the benefit of both Radha Mohan and himself. In setting aside that sale, the learned Judges of the High Court said—"We think that when liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property; and, if he or his agent dissuades others from purchasing

(1) (1881) I. L. R. 7 Calc. 313.

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widow getting possession of the notes is as follows :—The day before the second visit of the administrator *pendente lite* the widow and Kankana had a quarrel over the custody of the notes, and in the course of this quarrel Kankana threw down her key of the box, in which the notes were kept, and, subsequently, the widow removed the notes to the quarters of Upendra Nath Kundu, who was one of the co-sharers in the house at Gopalbari. Having regard to the subsequent history of the notes I think this story is correct.

Early in January 1905, the widow propounded in this Court a document, which she stated to be the last will of the deceased.

The widow was examined on commission in those proceedings and in the course of her evidence she stated that the Government Promissory Notes were in her possession. On the 29th April 1905, an application was made in the High Court for the appointment of a Receiver. The widow filed an affidavit in opposition to that application, wherein she stated that she had pledged certain of the notes for necessaries and costs of the suit. On the 4th May 1905, the Official Receiver was appointed to be Receiver of the estate of the deceased.

The petition for probate in the High Court was subsequently dismissed, the Court holding the alleged will propounded by the widow to be a forgery.

It will now be convenient to trace the subsequent history (so far as it appears from the evidence) of the notes from the date they were removed by the widow in the middle of December 1904.

On the 13th March 1905, Upendra Nath Kundu (being the person to whose quarters the widow had removed the notes) pledged with the Bank of Bengal certain of the notes of the face value of Rs 25,000 as security for an advance of Rs. 21,000.

On the 18th April 1905, Upendra Nath Kundu pledged a further parcel of the notes having a face value of Rs. 10,000 with the Bank of Bengal as security for an advance of Rs. 9,500.

On the 1st May 1905, Kedarnath, whom the evidence shows was connected with the widow, sold to the Bank of Bengal a further parcel of the notes having a face value of Rs. 11,000.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

VULCAN IRON WORKS
v.
BISHUMBHUR PROSAD.*

1908
December 7.

Injunction—Jurisdiction of High Court—Injunction to restrain proceedings in a Moffusil Court—Jurisdiction of Courts of Equity—Foreign Courts.

The jurisdiction of the High Court to restrain proceedings in Courts outside its jurisdiction is governed by the same principles as those that govern Courts of Equity in England, namely, that the party, whom it is sought to restrain, must be within the limits of the jurisdiction of the High Court, so that in the event of an injunction being granted against him and being disobeyed, he would be subject to process for contempt

The Carron Iron Co. v. *Maclaren* (1) followed. *Mungle Chand* v. *Gopal Ram* (2) not followed. A Court of Equity can only restrain a person from proceeding with a suit in a Foreign Court, if the person sought to be restrained is within the jurisdiction of the Court

CIVIL RULE.

THIS was a rule obtained by the plaintiffs calling upon the defendant to shew cause why he should not be restrained from proceeding with his suit instituted in the Court of the Subordinate Judge of Farruckabad pending the plaintiffs' suit instituted in the High Court.

Mr. Pugh, for the plaintiffs. The Court has power to grant an injunction restraining the defendant from prosecuting his suit at Farruckabad pending this suit here *Mungle Chand v. Gopal Ram* (2). Under sections 648 and 649 of the Code he can be arrested The mere fact that you have to send your order to another Court does not of itself make it an order of this Court. We are suing on several hundies and the defendant has brought a suit in the Moffusil Court to have these same hundies cancelled Our cause of action is substantially the same as the defendant's in the Moffusil Court.

* Original Civil Suit No. 506 of 1908.

(1) (1855) 5 H. L. C. 416 (2) (1906) I L. R. 34 Calc. 101.

APPELLATE CIVIL.

Before Mr. Justice Casperz and Mr. Justice Coxe.

1908
November 9.

RAM LOCHAN SINGH
v.
BENI PRASAD KUMRI.*

Civil Procedure Code (Act XIV of 1882) s. 492—Execution of decree—Application to a Civil Court for stay of sale in execution of a decree of a Revenue Court.

The Revenue Courts are Courts of Civil Judicature within the meaning of the Civil Procedure Code, in that their decrees, when transferred in the regular course, are to be treated in all respects as if they were passed by a Court of Civil Judicature.

Held, therefore, that an application under section 492 of the Code of Civil Procedure for stay of sale in execution of a decree of a Revenue Court in a suit under section 93 of Act XII of 1881, can be entertained by a Civil Court.

Onkar Singh v. Bhup Singh (1) dissented from.

APPEAL by the plaintiffs, Ram Lochan Singh and others.

Maharani Beni Pershad Koeri obtained a decree in the Court of the Collector of Balia, within the jurisdiction of the Allahabad High Court, under section 93 of Act XII of 1881, against the aforesaid plaintiffs on the 30th April 1897.

The decree having been partially executed in the district of Balia, was transferred to the district of Chapra, and then to the district of Bhagalpur, for execution. The property of the judgment-debtors (plaintiffs) having been advertised for sale, they put in an application under section 492 of the Code of Civil Procedure praying for an injunction to stay the sale of the properties attached in execution of the decree obtained by the defendants under the Rent Recovery Act of the United Provinces (Act XII of 1881), on the ground that the said decree was obtained fraudulently.

* Appeal from Order No. 38 of 1907, against the order of Nanda Lal Dey, Subordinate Judge of Bhagalpur, dated Jan. 5th, 1907.

(1) (1894) I. L. R. 16 All. 496.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

VULCAN IRON WORKS
v.
BISHUMBHUR PROSAD.*

1908
December 7.

Injunction—Jurisdiction of High Court—Injunction to restrain proceedings in a Moffusil Court—Jurisdiction of Courts of Equity—Foreign Courts

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CIVIL RULE.

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* Original Civil Suit No. 506 of 1908.

(1) (1855) 5 H L. C. 416. (2) (1906) I. L. R. 34 Calc. 101.

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RAM LOCHAN SINGH v. BENI PRASAD KUMRI.

the decree in the present case was a decree of a Revenue Court, section 492 did not apply. He followed the decision of the Allahabad High Court in *Onkar Singh* v. *Bhup Singh* (1). In the result, he allowed the objection, refused to issue any injunction, and set aside the *ad interim* injunction.

On appeal before us the questions are, *first*, whether the Subordinate Judge's view of the law is correct; and *secondly*, assuming it to be correct, whether, in the circumstances, he should not have allowed a temporary injunction to issue to stay the proceedings pending the disposal of title suit No. 686 of 1906.

Upon the first branch of the case, we entertain no doubt that the Subordinate Judge's view of the law is not correct. The decision in *Onkar Singh* v. *Bhup Singh* (1), on which the learned Subordinate Judge placed reliance, is not one which accords with the principle laid down by the Judicial Committee in *Nilmoni Singh Deo* v. *Tara Nath Mukerjee* (2). The decision of their Lordships was analysed and fully considered by a Full Bench of the Allahabad High Court in *Madho Prokash Singh* v. *Murli Manohar* (3). This decision of the Full Bench of the same Court does not appear to have been brought to the attention of the Judges in *Onkar Singh* v. *Bhup Singh* (1). We are of opinion that the Revenue Courts are Courts of Civil Judicature within the meaning of the Civil Procedure Code, in that their decrees, when transferred in the regular course, are to be treated in all respects as if they were passed by a Court of Civil Judicature. To hold the contrary view would lead to various anomalies, one of which was mentioned and explained at page 303 of the report in the case of *Nilmoni Singh Deo* v. *Tara Nath Mukerjee* (2). Though the decree of the Revenue Court at Balia was a decree in the execution of which relief was sought to be obtained from a Court of Civil Judicature, to which it has been transferred, that decree did not lose its original character It is only in the course of execution that the Civil

(1) (1894) I. L. R. 16 All. 496.
(2) (1882) I. L. R. 9 Calc. 295; L. R. 9 I. A. 174.
(3) (1883) I. L. R. 5 All. 406.

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VULCAN IRON WORKS v. BISHUMBHUR PROSAD.

FLETCHER J.

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Before Mr. Justice Fletch t with the present
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Injunction—Jurisdiction of High Court— ıssing the present plaintiffs.
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CIVIL RULE. well-known case of *The Carron Iron*

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(1) (1855) 5 H. L. C. 416 436.

APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Chitty.

1903
November 10.

TAMIJUDDI
v.
ASGAR HOWLADAR.

Superior landlord—Sub-tenant—Bengal Tenancy Act (VIII of 1885), s. 85.

As long as the interest of the tenant from year to year is not put an end to, the superior landlord has no right to eject the sub-lessee, who is not his raiyat, and the sub-lessee can maintain a suit for possession of the land, from which he is dispossessed by the superior landlord and a tenant of his, who is not the lessor of the plaintiff.

Section 85 of the Bengal Tenancy Act interpreted.

Gopal Mondal v. *Eshan Chunder Banerjee* (1) and *Madan Chandra Kapali* v. *Jaki Karikar* (2) explained and followed.

Srikant Mondul v. *Saroda Kant Mondul* (3), *Fazel Sheikh* v. *Keramuddi* (4), *Ramgati Mandul* v. *Shyama Charan Dutt* (5) and *Basaratulla Mundul* v. *Kasirunnessa Bibi* (6) held inapplicable

SECOND APPEAL by the plaintiff.

Asgar Howladar, the *pro forma* defendant No. 2 in the suit and one of the respondents in this appeal was one of the *maliks* of the *howla* named after him. Within the said *howla* there is a *jote* in the name of Arman Howladar. The plaintiff, who is the appellant in this appeal, claims the land in suit under Arman. The *jote* is made up of two plots and he is in possession of only one plot, being dispossessed of the other in Magh 1304 B. S. by the defendant No. 1, who acted in collusion with Asgar Howladar, the superior landlord. Hence the suit for establishment of title and recovery of possession thereon.

* Appeal from Appellate Decree, No. 2106 of 1907, against the decree of F. J. Graham, Officiating District Judge of Faridpur, dated 13th June 1907, reversing the decree of Srish Chandra Roy, officiating Munsiff at Bhanga, dated 2nd Mar h 1907.

(1) (1901) I. L. R. 29 Calc. 148
(2) (1902) 6 C. W. N. 377.
(3) (1898) I. L. R. 26 Calc. 46
(4) (1902) 6 C. W. N. 916.
(5) (1902) 6 C. W. N. 919.
(6) (1906) 11 C. W. N. 190.

ORIGINAL CIVI'

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Before Mr. Justice Fletch t with the present
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VULCAN IRON W(on Jail.

v. filed on this motion I

BISHUMBHUR ñ Court at Farruckabad,

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*Injunction—Jurisdiction of High Court—*ssing the present plaintiffs.
in a Mofussil Court—Jurisdiction of C :ould have been raised and

The jurisdiction of the High Court to
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disobeyed, he would be subject to pr his Court.
—*The Carron Iron Co.* v *Maclaren* (jurisdiction to restrain per-
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1908

VULCAN IRON WORKS *v.* BISHUMBHUR PROSAD.

FLETCHER J.

APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Chitty.

1903
November 10.

TAMIJUDDI
v.
ASGAR HOWLADAR.*

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SECOND APPEAL by the plaintiff.

Asgar Howladar, the *pro forma* defendant No. 2 in the suit and one of the respondents in this appeal was one of the *maliks* of the *howla* named after him. Within the said *howla* there is a *jote* in the name of Arman Howladar. The plaintiff, who is the appellant in this appeal, claims the land in suit under Arman. The *jote* is made up of two plots and he is in possession of only one plot, being dispossessed of the other in Magh 1304 B. S. by the defendant No. 1, who acted in collusion with Asgar Howladar, the superior landlord. Hence the suit for establishment of title and recovery of possession thereon.

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(4) (1902) 6 C. W. N. 916.
(5) (1902) 6 C. W. N. 919.
(6) (1906) 11 C. W. N. 190

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

BANKU BEHARI SIKDAR
v.
SECRETARY OF STATE FOR INDIA IN COUNCIL.*

1908
December 17.

Negotiable Instrument—Forged indorsement—Holder in due course—Onus of proof —Negotiable Instruments Act (XXVI of 1881), ss. 9, 46, 58, 59.

No person can claim a title to a negotiable instrument through a forged indorsement. Such an indorsement is a nullity and must be taken as if no such indorsement was on the instrument.

Chandra Kali Dabee v. *E. P Chapman* (1) not followed. *Hunsraj Purmanand* v. *Ruttonji Walji* (2) followed

Where a plaintiff establishes the fact that a negotiable instrument was obtained from its lawful owner by means of fraud, the onus of proving that a third party was a holder in due course lies on the defendant.

ORIGINAL SUIT.

THIS was a suit brought by the plaintiffs Banku Behari Sikdar and Parmessur Sikdar, executors of the will of one Gouri Prosad Kundu deceased, to recover from the defendant, the Secretary of State for India, the value of certain Government securities of the face value of Rs. 48,000 under the following circumstances.

Gouri Prosad Kundu, a wealthy inhabitant of Gopalbari in the District of Faridpur, died in Calcutta on the 22nd August 1904, possessed of Government securities of considerable value, and he appointed the plaintiffs his executors. On the 21st November 1904, the plaintiffs applied to the Court of the District Delegate of Faridpur for grant of probate of the testator's will, but owing to protracted litigation between the plaintiffs and the widow of the deceased testator, probate was not obtained till the 21st July 1906. Shortly after the death of the testator, his widow Sreemutty Hemanta Kumari

* Original Civil Suit No. 714 of 1907

(1) (1905) I. L. R. 32 Calc. 799, 815. (2) (1899) I. L. R. 24 Bom. 65, 67.

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does not seem to have been argued. If necessary, I would submit the case was wrongly decided.

Maulvi Wahed Hossein for the respondent. The sub-lease was void: *Fazel* v. *Keramuddi* (1), *Basaratulla Mundul* v. *Kasirunnessa Bibi* (2). Plaintiff, having no title, cannot succeed.

MITRA AND CHITTY JJ. There is no dispute as to the facts of this case. The defendant No. 2 is the superior landlord. The defendant No. 1 holds a plot of land under him. This plot is a portion of a holding held at one time by a raiyat Arman Howladar under the defendant No. 2. In 1889 Arman Howladar granted a lease of it along with other plots of land to the plaintiff. The lease was one from year to year; it was not permanent or for a term of years. The defendant No. 2 dispossessed the plaintiff, but the plaintiff is still in possession of other plots, which he holds under Arman. The present suit was instituted by the plaintiff for recovery of possession of this plot, on the ground that he was at least a tenant from year to year under Arman and that the defendants had no right to dispossess him.

On these facts the Munsiff held that the plaintiff was entitled to succeed and gave him a decree for possession. The lower Appellate Court had come to the conclusion that under section 85 of the Bengal Tenancy Act, the lease granted by Arman to the plaintiff was void. The lower Court has also held that the plaintiff had no title to rely on in a suit for recovery of possession.

It has, however, been found that the interest of Arman, as that of a raiyat, has not been put an end to. The plaintiff was paying to Arman the rent, which he was bound to pay under the lease of 1889, and Arman himself was paying rent to the second defendant. We do not see how we can come to the conclusion that the plaintiff had no title to sue for possession of the plot in dispute. He was, under the terms of the

(1) (1902) 6 C. W. N. 116. (2) (1906) 11 C. W. N. 193.

1908

BANKU BEHARI SIKDAR v. SECRETARY OF STATE FOR INDIA.

claimed to be entitled to recover the value of these securities. The defendant the Secretary of State denied that the securities were presented for renewal under forged endorsements, and denied that the Public Debt Office wrongfully put obstacles in the way of the plaintiffs or the administrator *pendente lite* getting information about the securities, and submitted that the securities for Rs. 48,000 were between the 23rd May and the 6th June 1905 on several occasions presented at the Public Debt Office by the Bank of Bengal for renewal by the issue of new notes, and the Public Debt Office in lieu of the said securities and in accordance with the practice of its office, properly, regularly and in due course, issued new notes to the Bank, and the former notes were afterwards cancelled. He denied that the former notes were destroyed and said that they were even now in the Public Debt Office, and submitted that the plaintiffs had no cause of action against him by reason of the renewal and cancellation of the securities in suit, and he submitted that the suit should be dismissed with costs

Mr. Chakravarti and *Mr Stokes* for the defendant the Secretary of State Section 9 of the Negotiable Instruments Act covers the case of defective endorsement. *Hunsraj Purmanand* v. *Ruttonji Walji* (1), *Chandra Kali Dabee* v *E P Chapman* (2) referred to. The Indian Contract Act places the offence of forgery on the same footing as any other offence. There is no such thing under the Indian Negotiable Instruments Act as section 24 of the Bills of Exchange Act, which deals with a case of forgery. See section 118, clause (g) of the Negotiable Instruments Act and *Bank of Bengal* v *Mendes* (3) The word 'offence,' in section 58 of the Negotiable Instruments Act includes the offence of forgery. The rule laid down in *The London Joint Stock Bank* v. *Charles James Simmons* (4) applies to this case. *Lloyd's Bank Limited* v. *Cooke* (5) and *Smith* v. *Prosser* (6) cited.

(1) (1899) I. L. R. 24 Bom 65, 67
(2) (1905) I. L. R. 32 Calc. 799, 815.
(3) (1880) I. L. R 5 Calc. 654, 665
(4) [1892] A C 201
(5) [1907] 1 K. B. 794.
(6) [1907] 2 K. B. 735 754.

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(1) (1902) 6 C. W. N. 516. (2) (1906) 11 C. W. N. 193.

prior to his decease carried on a rice business in the Suburbs of Calcutta.

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BANKU BEHARI SIKDAR v. SECRETARY OF STATE FOR INDIA
FLETCHER J.

The evidence is, and it is not disputed, that he was possessed of Government Promissory Notes of the face value of Rs. 56,000. These Government Notes were from time to time pledged with the firm of Roy of 55 Sova Bazar Street, Calcutta, for the purpose of raising money, when required, for the rice-business.

For the last eight years of his life-time the deceased Gouri Prosad Kundu had owing to declining health ceased to take any active part in the rice-business and had retired to his native village of Gopalbari.

There, on the 10th of May 1904, Gouri Prosad Kundu executed a registered will.

The evidence is, and there can be little doubt that it is true, that the deceased had his Government Promissory Notes with him at Gopalbari at the date he executed his registered will. In such will the deceased specifically refers to the Government Promissory Notes for Rs. 56,000, and it is in evidence that the Government Promissory Notes were taken out of the box, in which they were kept, for the purpose of taking the particulars thereof for insertion in the registered will

Sometime between 8th and 11th May 1904, the deceased left Gopalbari and came to Calcutta for the purpose of undergoing medical treatment He was accompanied to Calcutta by a niece, named Kankana, who has been called as a witness for the plaintiffs. The deceased, according to the evidence which I accept, brought with him to Calcutta the Government Promissory Notes for Rs. 56,000 and the registered will A house in Calcutta had been hired for the deceased and there he remained until his death on the 22nd of August 1904. The deceased's health, when he came to Calcutta, was bad and he gradually grew worse and for sometime before his death his condition was such that he could not transact any business It is common ground between the parties that on the 15th of June 1904, the deceased through his servants drew at the Public Debt Office the interest due on the Government Promissory

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TAMIJUDDI
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Kapali v. *Jaki Karikar* (1). The learned judges say in the last cited case that, when an under-raiyat holds under a written lease for an indefinite time (and in the present case, the lease is also for an indefinite time), the raiyat is not entitled to eject him by giving him a notice under section 49 (6), and that the words "the sub-lease shall not be valid" in section 85 (3) mean that the sub-lease shall not be valid against the landlord.

The decision in *Srikant Mondul* v. *Saroda Kant Mondul* (2) might at first sight appear to be against the view taken by us, but the question which has been raised before us was not distinctly raised before the learned Judges, who decided it, and it was not necessary for them to decide this question. The same observations would apply to *Fazel Sheikh* v. *Keramuddi* (3), *Ramgati Mandul* v. *Shyama Charan Dutt* (4) and *Basaratulla Mundul* v. *Kasirunnessa Bibi* (5).

We are, therefore, of opinion that the decision of the lower Appellate Court is erroneous. We accordingly set it aside and restore the judgment and decree of the Court of first instance with costs in all the Courts.

(1) (1902) 6 C. W. N. 377.
(2) (1898) I. L. R. 26 Calc. 46.
(3) (1902) 6 C. W. N. 916.
(4) (1907) 6 C. W. N. 919.
(5) (1906) 11 C. W. N. 190.

S. M.

The deceased left him surviving his widow Hemanta Kumari and his said niece Kankana, who was trusted by the deceased in his affairs and was accustomed to keep the deceased's keys. The plaintiffs, who married two nieces of the deceased, are the executors named in his registered will. Shortly after the deceased's death the widow, Kankana and the plaintiffs returned to Gopalbari. They took with them the registered will and the Government Promissory Notes. At that time the widow and the plaintiffs appeared to have been on good terms. After their arrival at Gopalbari the servant of a creditor of the deceased's business named Khettermoni arrived and pressed for security for the debt that was owing to his mistress. According to the plaintiffs' evidence, which I accept, the box containing the Government Promissory Notes was produced and notes of the face value of Rs. 7,000 were made over as security for Khettermoni's debt. Now some of the notes that were made over as security for Khettermoni's debt bear no endorsement by the deceased. It is a not insignificant fact that, if all the remaining notes had been endorsed by the deceased in blank, that the parties should go out of their way to hand over notes as security to Khettermoni, which were not capable of being negotiated.

The relations between the widow and the plaintiffs then ceased to be friendly. The widow seems to have disapproved of the terms of the registered will

A few days after the Pujahs in October 1904 there was a meeting of the agnates of the deceased's family and as part of the arrangement come to, it was decided that the Government Promissory Notes should be kept under two locks, the key of one should remain in the possession of Kankana and that of the other should be kept by the widow. On the 21st November 1904, the plaintiffs applied to the Court of the District Delegate of Faridpur for grant of probate of the registered will. This application was opposed by the widow.

The correspondence between the legal advisers of the plaintiffs and the Bank of Bengal, who manage the Public Debt Office on behalf of the Government of India, then commences.

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Kapali v. *Jaki Karikar* (1). The learned judges say in the last cited case that, when an under-raiyat holds under a written lease for an indefinite time (and in the present case, the lease is also for an indefinite time), the raiyat is not entitled to eject him by giving him a notice under section 49 (6), and that the words "the sub-lease shall not be valid" in section 85 (3) mean that the sub-lease shall not be valid against the landlord.

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(4) (1902) 6 C. W. N. 919.
(5) (1906) 11 C. W. N. 100.

S. M.

the notes during his life-time. We are instructed to request you not to pay the interest on the notes to any one except our clients, who are the only persons rightfully entitled to receive the same."

The schedule to the letter sets out full particulars of the notes.

This letter appears to me to come clearly within the rules relating to stoppage of the notes. The Bank are informed first, of the death of the deceased and that the plaintiffs are the executors and then there is a request for the stoppage of payment of interest.

The Bank reply to that letter on the 26th November 1904 that they could not recognise the plaintiffs, until they produced probate of the will.

Again on the 7th December 1904, the plaintiffs' attorneys wrote a further letter to the Bank, in which they stated "the probate will be produced to you after it is obtained from Court. No one besides our clients have the right to deal with the Government Promissory Notes in question." On the same date, the 7th December 1904, the District Judge at Faridpur appointed Asutosh Maitra, who has been called as a witness in this case, to be administrator *pendente lite* of the estate of the deceased.

On the 9th December 1904, Asutosh Maitra went to Gopalbari to take possession of the estate of the deceased On arriving there he was informed that the notes were in the custody of the widow and Kankana and was requested not to take possession of them as the parties hoped to come to a settlement.

The administrator *pendente lite* returned to Faridpur and reported the matter to the District Judge.

On the 14th or 15th December, the administrator *pendente lite* proceeded to Gopalbari for the second time

The administrator *pendente lite* was there informed that the Government Promissory Notes had been removed by the widow. On the morning after his arrival he had an interview with the widow, who stated that an elderly female relative, one Chandamoni, had got possession of the notes. The administrator *pendente lite* sought out Chandamoni, who denied having possession of the notes The plaintiffs' evidence as to the

On the 11th March 1887, a decree was made in favour of Gopal Lall Seal whereby it was held he took the *property subject* to valid legacies, annuities, and charitable trusts, and it was also referred to Mr. Robert Belchambers, at that time Registrar of the High Court, to enquire into and report upon certain matters including the charitable bequest. On the 26th April 1887, Mr. Robert Belchambers filed his report, by which Rs. 66,000 was to be deposited in Court to the credit of a separate account to be opened in the suit and entitled 'Charitable Dispensary,' and part of the joint property at Ramkristopore belonging to the deceased and his four brothers, should be set apart for the creation of a building for the Dispensary. This report was confirmed by the High Court on the 5th May 1887. The joint property at Ramkristopore was however partitioned in 1884, and in consequence it became impossible to carry out the wishes of the testator.

The funds now accumulated in Court to the credit of the 'Charitable Dispensary' account amounted to Rs. 20,411-1-6 in cash and Rs. 1,02,100 in Government paper. The plaintiff submitted, that the charitable bequest should be carried out in a manner as nearly in conformity with the wishes of the testator as the altered circumstances would permit, from the fund now standing to the separate account opened in suit No. 481 of 1886 and called a 'Charitable Dispensary,' and further that a proper scheme for the management of the charity should be settled by the Court.

Mr. W. H. Knight and *Mr. N. N. Sircar* for the defendants, Shamul Dhone Dutt, Norendra Lall Dey, Noyan Munjori Dassee and Panna Lall Seal. The first question is on clause 3 of the Will as to whether there is a particular intention. My submission being, that it must be a particular intention, for a particular poor, and at a particular spot. There is no idea of a general intention. Even if the testator had manifested a general charitable intention, the bequest must fail, because the discretion the testator gave to his executors was a personal one to erect a dispensary on a particular piece of land, but by reason of the death of all the executors and

On the 29th May 1905, Upendra sold to the Bank of Bengal a further parcel of the notes of the face value of Rs. 2,000.

On the 21st June 1905, Upendra wrote to the Bank of Bengal requesting them to sell the pledged notes of the face value of Rs. 35,000. The Bank accordingly did so and paid the balance to Upendra.

Thus the Bank of Bengal acquired notes of the face value of Rs. 48,000 out of the notes for Rs. 61,000, which belonged to the deceased at his death All these notes purport to be endorsed by the deceased. The Bank of Bengal presented the notes for Rs. 48,000 to the Public Debt Office and received in exchange in their own favour renewed notes for a similar amount.

The plaintiffs allege that these endorsements purporting to be made by the deceased are forgeries The defendant denies this, and further says that, even if the endorsements purporting to be made by the deceased on the back of the notes are forgeries, yet the Bank of Bengal became "holders in due course" of the notes *within the meaning of the Negotiable* Instruments Act. Now Government Promissory Notes are payable to the order of the payee and therefore pass by endorsement and delivery only (Section 46 of the Negotiable Instruments Act)

A "holder in due course" is defined in section 9 of the Act as any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque if payable to bearer or the payee or endorsee thereof, if payable to or to the order of a payee, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person, from whom he derived title.

But then the defendant says that under section 58 of the Negotiable Instruments Act, the Bank of Bengal, even if the signature of the deceased are forgeries, were "holders in due course," as they took the notes from some persons other than the deceased in good faith and for value.

In support of this proposition the defendant relies on the dictum of Stephen J. in *Chandra Kali Dabee v. E. P. Chapman* (1)

(1) (1905) I. L. R. 32 Calc. 799 815.

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ADVOCATE GENERAL OF BENGAL v. BELCHAMBERS.

FLETCHER J.

ment of a Charitable Dispensary, and fifty thousand rupees for carrying on the said Dispensary. The executors shall demarcate one portion of the joint garden house we have at Ramkristoporegram as my separate share, and erect the buildings thereon, and after purchasing Company's papers for fifty thousand rupees, shall, out of the interest thereof, continue to carry on the work of the Charitable Dispensary. On to the said Dispensary (they) shall put up a signboard (slab) of stone with my name written on it, and (they) shall likewise have the power of paying over the said amount, and making over the charge of carrying on the work of the said Charitable Dispensary into the hands of Government."

After the death of Kanai Lall Seal an administration suit was started by Gopal Lall Seal, his only son, for the purpose of administering the estate, and in course of that administration suit, a reference was made to the Registrar to enquire and report upon certain matters including the public charitable bequest contained in the third paragraph of his Will.

On the 26th April 1887, the Registrar reports :—"A sum of Rs. 66,000 should be deposited in Court to the credit of a separate account to be opened in this suit and entitled Charitable Dispensary."

In accordance with the terms of that report, which was confirmed by an order of this Court on the 5th May 1887, a sum of Rs. 66,000 was lodged in Court to the credit of a separate account, which was opened in Suit 481 of 1886 and entitled "Charitable Dispensary Account" and these funds by the accumulation of interest are now represented by G. P. Notes of the nominal value of Rs. 1,02,100 and Rs 20,411-1-6, in cash. Mr. Knight on behalf of the defendants, other than the defendant Belchambers, has argued, that clause 3 of the Will does not show any general charitable intention, and that the only object the testator had in view was, that his trustee should have a license to erect a building on a part of the garden house and there carry on the business of a dispensary. To that argument I am unable to assent. The testator begins clause 3 of his Will by giving in charity.

The decree-holder denied that the decree was obtained by fraud and stated that the application for injunction was a frivolous one. The Court below having held that section 492 of the Code of Civil Procedure did not apply to the present case, inasmuch as the decree was of a Revenue Court, rejected the plaintiffs' application.

Against this decision the judgment-debtors (plaintiffs) appealed to the High Court.

Babu Jogesh Chunder Dey for the appellants.

Babu Ram Churn Mitter and *Babu Jogendra Chunder Ghose* for the respondent.

CASPERSZ AND COXE JJ. This appeal comes before us in the course of a long litigation, the termination of which is not yet in sight. On the 30th April 1897, the defendant obtained an *ex parte* decree in suit No. 29 of 1896 under section 93 of the North-Western Provinces Rent Act (XII of 1881) That decree, it is conceded, was executed, and one of the execution cases was No 296 of 1905 in the district of Saran where, it appears, the decree of the Balia Revenue Court had been sent for execution under the provisions of the Civil Procedure Code. Satisfaction not having been obtained, execution was next taken in the district of Bhagalpur, also, in terms of the Code of Civil Procedure, and the decree-holder attached 188 bighas of land situated in that district.

Thereupon, the plaintiffs, who represent the original judgment-debtors, instituted a title suit No 686 of 1906, in the Court of the Subordinate Judge of Bhagalpur, and applied for a temporary injunction to stay the sale in the execution case then pending and arising out of the original *ex parte* decree of 1897. The Subordinate Judge granted an *ad interim* injunction. On the 5th January 1907, he disposed of the application under section 492 of the Civil Procedure Code, and held that the decree contemplated by clause (a), section 492 of the Civil Procedure Code means a Civil Court decree, and that, as

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FLETCHER J.

accrued on the fund in Court, applicable as a portion of the residue of the estate. The accumulations of interest therefore form part of the capital for the purpose of carrying out the charity. There must therefore be a reference to Chambers to frame a scheme for giving effect to the charity designated by the testator in clause 3 of the Will.

Mr. Knight's clients may appear on the reference.

Attorney for the plaintiff: *Eggar.*

Attorneys for the defendants: *S. D. Dutt and Ghose.*

B. C. M.

Court should treat such a decree in all respects as if it had been passed by itself.

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The result, therefore, must be that the case is one in which it was competent to the Subordinate Judge, if he thought fit, to issue an *ad interim* injunction staying the execution proceedings.

It has been impressed upon us that we should not interfere in this case in order that the Subordinate Judge might consider whether he ought to grant a temporary injunction ; but we think that we should pass the necessary orders to save both time and further expense to the litigant parties We have to consider whether a temporary injunction should now issue Suit No. 686 of 1906 is one in which various questions of law are involved. Without expressing any opinion on those questions, or the issues which appear to have been framed, we think it sufficient to say that the alleged value of the property involved is Rs. 19,000 ; that the proceedings commenced more than ten years ago ; and that the chances of success are not altogether in favour of the plaintiff in that suit, which is virtually one to set aside the decree of the Revenue Court in another province. The amount for which execution has been levied comes to about Rs 1,300 We think the proper order to pass in this case will be that, on the deposit of that amount, namely, Rs 1,300 (one thousand and three hundred), in the Court of the Subordinate Judge within one month from this date, the Subordinate Judge do issue an injunction staying the proceedings in the execution case No. 1210 of 1906 pending in the First Munsif's Court, Bhagalpur The amount will, of course, remain in deposit pending the result of suit No 686 of 1906.

Appeal allowed.

S. C. G.

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lished—*vide* the letter from the Government to the Board of Commissioners in Bihar and Benares, dated 24th December 1818. What would be the effect of this on the *nimaksayar* right? The onus is on the Government or the party claiming under it to prove reservation? We have all possible rights under the zemindari grant. [Mitra J. The main question is 'how did later legislation affect the Permanent Settlement'?]

Hon. Dr. Rash Behary Ghose (*Babu Naliniranjan Chatterjee* with him) for the respondent. Monopoly has no connection with the title of the Raj to the salt *mahal*. The *nimaksayar mahal* is a separate *mahal*. It was like an incorporeal hereditament. Government cannot settle land with me and receive revenue, and then by legislative enactment affect my right. [Mitra J. Cannot the Government in its legislative capacity weaken the effect of its previous executive action?] But what of my title to the land? Although the defendants are the owners, the plaintiff has the sole right to the saltpetre lands. [Mitra J. Was the *nimaksayar mahal* separated from the estate? If it was, the Raj could have an injunction.] The right to the land also is mine. It is an exclusive right. [Mitra J. Look at the prayers in your plaint.]

Babu Golap Chandra Sarkar in reply. The Permanent Settlement merely declared the Zemindars to be the actual proprietors. [Mitra J But the Government had its share. It had rights to settle land.] Yes, the Government settled the revenue arising out of *nimaksayar* with the Mukerjees, and they sold their right to the Betia Raj. The monopoly is now gone. The *Raj* may have *Malikana*. After the passing of Regulation IV of 1814, the Government has only a share in the salt revenue, and it can settle that share only. The respondent can claim only a portion—*vide* Hunter's Statistical Accounts, Vol. XIII, pages 289, 349, and Regulation VIII of 1819, Section 12. The old Hindu law is applicable, see Regulations XXXVII and XIX of 1793.

Cur. adv. vult.

The defendants filed a joint written statement and pleaded *inter alia* that the lease granted by Arman to the plaintiff was void under section 85 of the Bengal Tenancy Act, since it was for an indefinite period, and that, even if the view were adopted that the lease was valid for nine years, that period having come to an end about a month after the dispossession, the plaintiff could have no title whatever at the date of the institution of the suit.

The Munsiff decreed the suit holding that the plaintiff had an existing under-raiyati right in the land in suit. The District Judge reversed the decision of the Munsiff, upholding the contention of the defendants.

Dr. Priyanath Sen for the appellant. So long as the tenancy of Arman Howladar subsists, the question whether the plaintiff's sub-lease is or is not binding against the superior landlord cannot arise. The tenancy of Arman Howladar serves as a shield to protect the sub-lease from being attached by the superior landlord and the plaintiff is entitled to succeed on the basis of the sub-lease to recover possession from the defendants. Section 85 of the Bengal Tenancy Act does not help the defendants. Firstly, there is no sub-lease executed by the *raiyat*, but there is a *kabuliyat* executed by the under-raiyat. Hence sub-section (2) does not stand in the way of its registration. Secondly, assuming that a *kabuliyat* stands on the same footing as a lease, the lease in this case is not for a term exceeding nine years, but is really a lease from year to year. *Thirdly*, sub-section (2) only prohibits registration, and the effect of that would be to make the registration ineffectual, if it took place in contravention of that sub-section, and the further result would be that the case would come under sub-section (1). The raiyat himself cannot avoid the sub-lease, and, so long as the raiyat's interest subsists, the under-raiyat is safe. See *Gopal Mondal* v. *Eshan Chunder Banerjee* (1) and *Madan Chandra Kapali* v. *Jaki Karikar* (2). In *Srikant Mondul* v. *Sarola Kant Mondal* (3) the precise point raised by me

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Nawabs before settlement with the Mukerjees, and there is also no finding as to how, at or about the settlements in the last decade of the eighteenth century, the right was exercised by the settlement-holders. We do not think that the reliefs claimed in the plaint or any of them should be granted without a distinct finding as to the mode of user.

It is conceded by Dr. Rash Behari Ghose that the plaintiff is not entitled to a declaration as to her right to a monopoly in the manufacture of saltpetre. It is also conceded that the second prayer in the plaint, *i.e.*, the prayer for injunction, cannot be founded on the ground of the existence of a right to a monopoly. She may have an injunction on the ground of her exclusive right, if any, as conferred by the settlement under which she holds the *nimaksayar mahal.* She cannot also be allowed the third relief claimed in the plaint, *i.e.*, the demolition or possession of the Dihi at Manpura. Her prayer for damages must follow the finding as to the mode of the user. We do not, however, see how she may get a decree for mesne profits as allowed by the lower Courts.

We, therefore, direct a remand to the lower appellate Court for ascertaining from the evidence on the record and such other evidence as the parties may produce, the precise way in which the exclusive right claimed by the plaintiff was exercised in the past. The decree should be in accordance with the finding that may be arrived at and the observations made above

The costs of this appeal as well as those of the lower Courts will abide the result.

Case remanded

S. M

lease to him, a tenant from year to year, and, even if the lease was void for certain purposes, it could not be held to be void against his own landlord Arman; and, as long as Arman's interest is not put an end to, the defendant No. 2 has no right to eject the plaintiff, who is not his raiyat

The words of section 85 of the Bengal Tenancy Act appear to us to be clear, at least, in one respect, namely, that a sub-lease granted by a raiyat is void only under the circumstances specified therein as against the landlord, but is not necessarily void so far as the raiyat and the under-raiyat themselves are concerned It does not appear to bar the creation of a right in the under-raiyat to the extent of the right of the raiyat himself. Sub-section (1) expressly says that a sub-lease shall not be valid against the landlord. Sub-section (3) also refers to the right of a landlord if a sub-lease was granted before the passing of the Bengal Tenancy Act. Sub-section (2) was put in between sub-section (1) and sub-section (3) evidently for the benefit of the landlord only to prevent the registration of a document, if it creates a tenancy of more than nine years or in perpetuity.

The lease in the present case is not one for more than nine years and is not also permanent, and there was therefore no bar to the registration of the lease, even if it be considered that the kabulyat had the same effect as a lease. Thus there is nothing in section 85 to make the lease to the plaintiff void for all purposes.

The lower Appellate Court has relied on certain cases decided by this Court, but none of them appear to us to be applicable to the facts of the present case. *Gopal Mondal* v. *Eshan Chunder Banerjee* (1) may be used in favour of the contention of the plaintiff and supports our view of the law as laid down in section 85. It lays down that a sub-lease granted by a raiyat in contravention of the provisions of section 85 of the Bengal Tenancy Act is void against the landlord only and not against the raiyat or any person claiming through the raiyat. To the same effect is the decision of this Court in *Madan Chandra*

(1) (1901) I. L. R. 29 Calc. 159

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remaining portion, thus becoming the sole lessee of the whole of the lands and tenements and fishing rights and fish hat for a period of 19 years ending with the 30th April 1899. On the expiry of the above lease, Bhoba Nath Sen obtained a renewal for a further period of 10 years from the 1st January 1900 to the 31st December 1909, at a consolidated annual rental of Rs. 13,263.

With regard to the deposit of the city refuse at the "Dhappa Square Mile," it was alleged that it had been the invariable practice of the Corporation to enter into separate agreements, independent of the lease of the premises, for unloading the waggons of refuse at the "Square Mile." Such a separate agreement was entered into with Bhoba Nath Sen for a period terminating with his renewed lease on December 31st, 1909, at the annual cost to the Corporation of about Rs. 42,000.

On the 29th October 1906, Bhoba Nath Sen proposed to the Chairman of the Corporation certain schemes for the improvement of the "Square Mile" and the fisheries attached, which he was willing to undertake, in consideration of the Corporation renewing the current lease on its expiry, for a further term of 20 years "on a fair and equitable rental." In connection with these proposals a report was submitted by the Secretary to the Corporation, dealing with the history, the character and the previous use made of the "Square Mile." On the 18th December 1907, at a meeting of the Corporation, a Special Committee was appointed to consider the proposed schemes, and on the 8th January 1908, the Corporation further referred to the Special Committee the question of the charges of unloading the refuse-waggons.

It appears that offers were received by the Corporation from others besides Bhoba Nath Sen, in respect of the lease of the premises and the work of unloading the waggons, including an application from Jogendra Nath Mukhuti on the 2nd March 1908. All these offers were rejected by the Special Committee, who finally decided on the 8th May 1908 that no tender should be invited for the lease of the premises and the work of unloading the waggons. Thereafter at the

lease to him, a tenant from year to year, and, even if the lease was void for certain purposes, it could not be held to be void against his own landlord Arman; and, as long as Arman's interest is not put an end to, the defendant No. 2 has no right to eject the plaintiff, who is not his raiyat.

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contract for unloading is a covenant of the lease, and is not such as falls within the purview of section 88. *The Queen* v. *Gaskarth* (1) was referred to. A similar section in the Public Health Act (38 and 39 Vict. C. 35) has been held to be merely directory. See *Soothill Upper Urban Council* v. *Wakefield Rural Council* (2). Under section 556 of the Calcutta Municipal Act, the Corporation has full power to grant a lease of any premises vested in them, on such terms as they may think fit.

Mr. B. C. Mitter (*Mr. B. L. Mitter* with him) for Bhoba Nath Sen supported the argument of the Advocate-General.

Mr. Chakravarti (*Mr. Lahiri* with him) for Jogendra Nath Mukhuti in support of the rule. The Chairman and the Corporation have acted *ultra vires*, and this Court has jurisdiction to grant relief to a party aggrieved. The proper form of seeking relief is by an application under section 45 of the Specific Relief Act for an order in the nature of a *mandamus* See *The Bank of Bombay* v. *Suleman Somji* (3), *In re Tarabai* (4), *London County Council* v. *Attorney General* (5). The facts of this case are covered not by section 556 but by section 88 of the Calcutta Municipal Act. The true nature and not the form of the transaction must be regarded. See *In re Watson* (6). Instead of the contract for the disposal of the refuse being a term in the lease, the lease itself was ancillary to the main provision in the engagement, which was for the disposal of the refuse of Calcutta. It was sought to evade the operation of section 88, by representing the transaction under the colour of a lease, thus committing a fraud on the Act. See Maxwell on Statutes, 3rd edition, pages 171, 186, 475; Craies on Statutes, 4th edition, pages 77, 223, 224.

Cur adv. vult.

(1) (1880) L. R. 5 Q. B. D. 321.
(2) [1905] 2 Ch. 516.
(3) (1908) 12 C. W. N. 825.
(4) (1905) 7 Bom. L. R. 161.
(5) [1902] A. C. 165
(6) (1890) L. R. 25 Q. B. D. 27.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

ADVOCATE-GENERAL OF BENGAL
v.
BELCHAMBERS *

1908
December 8.

Will—Bequest to a charity—General charitable intention—Death of executors—Charity not established—Accumulations of interest on fund—Residue of estate—Cy-pres doctrine.

Where a testator has manifested a general charitable intention, the bequest will not fail merely because the executors are dead, and the land which the testator desired for his charity is not available for the purpose. The fact that a charity has not been established earlier does not render the interest accrued on the fund applicable as a portion of the residue of the estate.

Accumulations of interest form part of the capital for the purpose of carrying out the object of the charity.

ORIGINAL SUIT.

THIS was a suit brought by the Advocate-General of Bengal for construction of the Will of one Kanai Lall deceased under the following circumstances. The testator died on the 25th November 1884 possessed of considerable property and leaving him surviving Gopal Lall Seal his only son. The Will, which was dated the 10th August 1883, contained, amongst other things, a direction to his executors to set apart a sum of Rs. 16,000 for a Charitable Dispensary and Rs. 50,000 for its up-keep, and the testator directed his executors to demarcate a portion of his garden house at Ramkristopore for the erection of the Dispensary. On the 11th December 1884, the executors obtained probate of the Will. Subsequently, on the 24th November 1886, the executors transferred all the property of the testator to the Administrator General of Bengal. Thereafter, on the 13th December 1886, Gopal Lall Seal brought a suit against the surviving executors and the Administrator General for construction of the Will of his father.

* Original Civil Suit No. 16 of 1908.

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IN THE MATTER OF JOGENDRA NATH MUKHUTI

WOODROFFE J.

controlled by the provisions of *section 88* of the Municipal Act, which requires that in the case of contracts for the execution of any work involving an expenditure of over Rs. 10,000, tenders should be called for. Had there been simply a contract for the unloading of the refuse at a certain charge then no doubt that section would have applied. This is not disputed. But the proposal here is that Babu Bhoba Nath Sen should do the work without charge as a term and condition of a lease of the "Square Mile," which is granted to him upon this and other considerations. Section 556 enables the Corporation to lease any property vested in them (and the Square Mile is so vested) on any terms they think fit. No tenders are required before the property is leased. No doubt an agreement for a lease is a contract though the lease when completed is a conveyance. Further, a covenant in the lease is a contract, and in this sense the covenant in respect of the lease is a contract. The question, however, is whether it is a contract within the meaning of section 88 and governed by it. It is of course conceded that the law cannot be evaded by giving the form of a lease to a transaction which properly falls under section 88. Whether this has been done must be determined on the facts of each particular case. A test, which may be applied, is this:—Is the covenant one which relates to the demised premises, or is it independent of them. In this case it so relates. The covenant and the lease are closely related to one another. The refuse is unloaded into the Square Mile with a view not only to the disposal of the former, but the reclamation of the latter. And experience has shewn that this reclamation can be best effected when both the duty of unloading and the benefits of the lease of the land, are cast upon and vested in the same person. The fact which is relied on by the applicant that the lease is terminable upon a different mode being agreed to as to the disposal of the refuse so far from destroying the relation to which I have referred, on the contrary, confirms it. In my opinion the present case is not governed by section 88 and it is not obligatory upon the Corporation to call for tenders. To hold

certain partition proceedings, the testator's estate ceased to have any interest in the land in question. Consequently the intention of the testator must fail. Further the clause in the Will is too wide for a charitable gift. None of the requisities of *a valid charitable gift exist there It is a condition precedent,* and the condition having become impossible the gift is void On the question of the surplus of Rs. 60,000, the testator did not contemplate multiplying his charity by two He never contemplated that the fund should go as from his death to the charity. The testator contemplated an interval of uncertain duration, and it was not until that interval had elapsed that *the charitable gift would arise Is the position altered by* the fact that instead of a year elapsing or six months, a period of 20 years had elapsed? I submit it makes no difference at all. The Court has not only to look to the intention, but to the express intention *Forbes v Forbes* (1) distinguished.

Mr. B. C. Mitter and *Mr. Eggar* for the Advocate-General. My contention is that this is not a gift to a particular charity [Fletcher J I do not want to hear you any further.]

M. H D. Bose for the defendant, Robert Belchambers

FLETCHER J This is a suit brought by the Advocate-General for the purpose of having a scheme framed with reference to certain charitable bequests contained in the Will of Kanai Lall Seal, *who died on the 25th November 1884. He* appears to have been a man of considerable wealth.

By his Will, which is dated the 10th August 1883, after appointing his sister's husband, his wife, brother-in-law and his brother, his manager, James Meak and his dewan executors and executrix, the testator makes provision for the charitable bequests in question.

The terms of clause 3 of his Will are as follows:—

"I give in charity twelve to sixteen thousand rupees for building a lower roomed house and premises for the establish-

(1) (1854) 18 Beav 552, 553

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Doss

1908
May 6.

HARI CHARAN SANT
v.
KAILASH CHANDRA BHUYAN.*

Malicious prosecution—Malice—Reasonable and probable cause—Damages—Liability of complainant

Where it is found that the defendant not only lodged the complaint before the police, but virtually fabricated false evidence to procure the plaintiff's conviction, and there was a want of reasonable and probable cause for the institution of the criminal case, the defendant must be held to be the real and virtual prosecutor and liable for damages.

Bhul Chand Patro v. Palun Bas (1) followed

SECOND APPEAL by the defendant.

Hari Charan Sant, the defendant-appellant, charged Syama Charan Bhuyan and Kailash Chandra Bhuyan in two cases under section 406 of the Indian Penal Code, with having committed criminal breach of trust in respect of five bags of paddy worth about Rs. 14 The Deputy Magistrate of Alipur found the accused not guilty and acquitted them. Thereafter the two accused instituted two suits for damages for malicious prosecution against the said Hari Charan Sant at whose instance the criminal prosecution was instituted by the Crown.

The Munsif held that the defendant did not set the Magistrate in motion and could not be regarded as the prosecutor and concluded from the facts of the case that there was reasonable and probable cause for the institution of the criminal case. On appeal, the Subordinate Judge upset the finding and the judgment of the Munsif, characterising the evidence in the

*Appeals from Appellate Decrees, Nos. 596, etc. of 1907, against the decrees of Annada Prasad Bagchi, Subordinate Judge of 24-Parganas, dated 18th December 1906, modifying the decrees of Pankaja Kumar Chatterjee, Munsif of Alipur, dated 17th May 1906.

(1) (1903) 12 C. W. N. 818, foot-note.

Mr. Knight next argued that the bequest, even if the testator had manifested a general charitable intention, must fail, because the discretion the testator gave to his executors was a personal one to erect a dispensary on a particular piece of ground, and that by reason of the death of all the executors and also by reason of certain partition proceedings, the testator's estate has ceased to have any interest in the land in question, and the testator's intention must wholly fail.

But according to the doctrine of Cy-pres, it is quite clear that the testator has manifested a general charitable intention, this should not fail to be carried out merely because the executors are all dead and the particular land, on which the testator desired the dispensary to be erected, is not available for the purpose.

The next point Mr. Knight raises is that his clients are blood relations and are entitled to have the administration of the charity. On that point I am unable to accept the learned Counsel's argument, the testator meant the charities to be established by his executors and they were to carry out the charity, when established That was a personal discretion vested in the executors. The testator must have contemplated that some day his executors would die, and it cannot be said he meant the charity to come to an end on their death, moreover the testator by his Will provides that the executors should have power to make over the charities to Government. There are no words in his Will nor is there any intention that this particular charity is to remain under the administration of any of the testator's relatives.

The last point is with regard to accumulations of interest on the fund in Court. These funds stand in Court to the credit of a separate account. It is well established that when monies have been lodged in Court to the credit of a separate account, they become separated from the general estate. The interest therefore accruing on a fund standing to a separate account does not form part of the residue, but goes so as to increase the fund in Court. Simply because the charity has not been established earlier does not render the interest, which has

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HARI CHARAN SANT v. KAILASH CHANDRA BHUYAN

MACLEAN C. J.

before us on second appeal, and we must take the findings of the Judge in the Court below as binding upon us. That Court has decided against the appellant and decreed a very small amount of damages. The appellant appeals: and he says that the action would not lie, that he was not the prosecutor, but that the police were the prosecutors. Now, what are the findings of the Court below? There are findings of malice, findings of want of reasonable and probable cause for the institution of the criminal case. The Judge also finds, "The defendant did not only lodge the complaint before the police, but did virtually fabricate false evidence to procure the plaintiff's conviction. The defendant did actually appoint a mukhtear to prosecute the plaintiff. The *mukhtearnamah* shows for what object the mukhtear was appointed. It was clearly stated in it that the mukhtear was to 'prosecute,' and the evidence is that the mukhtear did actually cross-examine the defence-witnesses before the Magistrate: and, as stated before the Magistrate, treated the defendant as the virtual prosecutor." I think upon these findings it is clear that the defendant was the real and virtual prosecutor. The case is identical with the case of *Bhul Chand Patro* v. *Palun Bas* (1) and in the judgment in that case some English authorities are referred to, which support the view of the present lower Appellate Court. I might almost avail myself of the language of Chief Justice Cockburn in the case of *Fitz-John* v. *Mackinder* (2), where he says, "I can only say that in my opinion it would be a lamentable reproach to our law if a claim for redress for so grievous a wrong could be defeated by legal difficulties of a purely technical character." I think in this case it would be lamentable if, taking the facts as found, it were held that the plaintiff had no redress.

The appeals, therefore, fail and must be dismissed with costs.

DOSS J. I agree.

Appeals dismissed.

(1) (1903) 12 C. W. N. 818. (2) (1861) 9 C. B. N. S. 533

S. M.

APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Carnduff.

GOLAB CHAND

v

JANKI KOER.*

1908
December 17.

Saltpetre—Monopoly—Manufacture—Regulation IV of 1814—Effect on the monopoly

The abolition of the monopoly of the East India Company to the manufacture of saltpetre by Regulation IV of 1814 was not intended to affect the right of a purchaser of the monopoly to realize his dues either in the shape of royalty from the manufacturers or himself to manufacture saltpetre, to the exclusion of all other persons or proprietors of land in the *nimaksayar mahal*.

The right to grant license and realize royalty would not be *inconsistent* with the abolition of a monopoly.

SECOND APPEAL by the defendants.

In the suit in appeal, Maharani Janki Koer, widow of Maharaja Sir Harendra Kishore Singh Bahadur of Betia, sought for a declaration of her right to a monopoly in the manufacture of saltpetre and collection of saltpetre earth in village Manpura, as well as for an injunction restraining the defendants from infringing the said right. She further prayed for demolition of the salt-*dihi* lately started by the defendants in Pous 1311 F.S in the said village or for possession of the same with mesne profits. The defendants denied *inter alia* the plaintiff's alleged right to the monopoly. The Munsif decreed the suit and, on appeal, the Subordinate Judge affirmed the decision of the first Court.

Babu Golap Chandra Sarkar (*Babu Dwarka Nath Mitra* and *Babu Sarat Kumar Mitra* with him) for the appellant. *Nimaksayar* is not like other *sayar* lands The monopoly was abo-

* Appeal from Appellate Decree No 1353 of 1907, against the decree of Umesh Chandra Sen, Additional Subordinate Judge of Mozufferpore, dated 27th March 1907, affirming the decree of Ashutosh Ghosh, Munsif of Motihari dated 27th January 1903

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under s. 157 of the Act in corroboration of the evidence of the witness given at the trial.

The proviso to section 162 of the present Code is confined to, and is for the benefit of, the accused.

Queen-Empress v. *Bhairab Chunder Chuckerbutty* (1) distinguished. *Emperor* v. *Narayan Raghunath Patki* (2), *per* Beaman J., dissented from. *Reg.* v. *Uttamchand Kapurchand* (3), and *Empress* v. *Kali Churn Chunari* (4) referred to.

CRIMINAL APPEALS.

THE appellants were tried before the Sessions Judge of Jessore with a Jury who, by a majority of four to one, convicted them under sections $\frac{302}{149}$ of the Penal Code. The Judge, accepting the verdict of the majority, sentenced the accused to transportation for life on the 5th June 1908, and they now appealed to the High Court.

Mr. K. N. Choudhry (*Babu Narendra Kumar Bose* with him in No. 693, and *Babu Monmotho Nath Mukerjee* in Nos. 694 and 695) for the appellants. The heads of charge were not written out till a month after. This is not contemplated by the law. Refers to s. 367 of the Code. The Judge has misdirected the Jury on several points. He has not read out the medical evidence to them, nor has he told them that the omission of the prosecution to call important witnesses raised a presumption that their evidence would have been unfavourable to the Crown: *See the Evidence Act* s. 114, *Ill.* (*g*). His direction to the Jury on s. 141 of the Penal Code is not explicit. He has further wrongly admitted oral evidence of the statement of a witness made to the police during the police investigation. Such statement cannot be used under s. 162 of the Code to corroborate the witness giving evidence in Court: See *Queen-Empress* v. *Bhairab Chunder Chuckerbutty* (1) and *Emperor* v. *Narayan Raghunath Patki* (2).

Babu Atulya Churn Bose and *Babu Bunkim Chunder Sen* for the Crown. S. 367 does not require a written judgment

(1) (1898) 2 C. W. N. 702.
(2) (1907) I. L. R. 32 Bom. 111.
(3) (1874) 11 Bom. H. C. 120.
(4) (1881) I. L. R. 8 Calc. 154.

MITRA AND CARNDUFF JJ. We have no doubt on the facts proved in the case that the plaintiff as the present proprietress of the Betia Raj is entitled to a declaration of her right as the Permanent Settlement-holder under Government of the saltpetre *mahal* of Sarkar Champaran, which includes the village Manpura owned by the defendant appellant The settlement papers of 1791 and 1793 conclusively prove that the *nimaksayar mahal* of Sarkar Champaran along with the villages Sangrampore and others was settled with the Mukerjees, and that the revenue for the *nimaksayar mahal* was separately assessed at Rs. 2,293 and odd The revenue was regularly paid to the Government in later years. The mahal passed to the Betia Raj by purchase in 1804, and the predecessors of the *plaintiff were in possession and paid regularly the Government* dues according to the assessment made by the Government.

[illegible] the documents and the findings of fact [illegible] appellate Court that the right to the *nimaksayar* dues was exclusive, and that what passed by the settlement with the Mukerjees and the purchase of their right by the Betia Raj was the right which was exercised by the East India Company by virtue of the grants made by the Nawabs Mir Zafer and Kassim Ali and the Dewani of the 12th August 1765. The plaintiff, it appears to us, is entitled to exercise the same right.

Regulations VIII of 1812 and IV of 1814 were not intended either to extend or to limit the right which the Betia Raj had to the *nimaksayar mahal* in Sarkar Champaran The abolition of the monopoly of the East India Company by the latter Regulation was not intended to affect the right of the Raj to realise its dues either in the shape of royalty from the manufacturers or itself to manufacture saltpetre to the exclusion of all other persons or proprietors of land in Sarkar Champaran The right to grant licenses and realise royalty would not be inconsistent with the abolition of monopoly.

There is, however, no distinct finding in the judgment of the lower appellate Court as to the way in which the East India Company exercised the right it had under the grants from the

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the 29th June, nearly three weeks after the sentence. We are strongly of opinion that in these cases such charge ought to be written out as soon as possible after the charge to the Jury has been actually delivered, and when the facts of the case are fresh in the mind of the Judge.

The first point of misdirection is that the Judge did not read the medical evidence to the Jury, but one has only to look at the charge to see that there were frequent references to the medical evidence. There is nothing that makes it incumbent upon any Judge to read the whole of the depositions of the witnesses to the Jury, and, we think, in the present case the medical evidence was sufficiently attracted to their attention.

Then it is said that the Judge did not sufficiently warn the Jury that the omission of the prosecution to call certain witnesses, and particularly the palki-bearers, raised a presumption that their evidence would be unfavourable to the prosecution, and reference is made to section 114 *Ill.* (*g*) of the Evidence Act. It is perfectly true that in his charge we do not find the word "presumption," but again and again the Judge has pointed out to the Jury that they might properly draw any inferences they pleased from the fact that these witnesses were not called There is no substance in this point.

Then it is suggested that the Judge did not sufficiently explain to the Jury the provisions of section 141 of the Indian Penal Code. But it appears from a note made by the Judge that in the charge to the Jury they were told that, if the five persons went in a body with the common object of murdering Banku Behari, and, if he was killed in the prosecution of that common object, then, no matter which of them struck the blow or blows, which caused death, all would be equally guilty of murder under section 302, read with section 149 of the Indian Penal Code. We scarcely think we should be justified in saying, if the Judge, as appears, so addressed the Jury, that there was any real misdirection on this point.

There only remains the question whether the Court below was wrong in admitting oral evidence of a statement made to

MITRA AND CARNDUFF JJ. We have no doubt on the facts proved in the case that the plaintiff as the present proprietress of the Betia Raj is entitled to a declaration of her right as the Permanent Settlement-holder under Government of the saltpetre *mahal* of Sarkar Champaran, which includes the village Manpura owned by the defendant appellant The settlement papers of 1791 and 1793 conclusively prove that the *nimaksayar mahal* of Sarkar Champaran along with the villages Sangrampore and others was settled with the Mukerjees, and that the revenue for the *nimaksayar mahal* was separately assessed at Rs. 2,293 and odd The revenue was regularly paid to the Government in later years. The mahal passed to the Betia Raj by purchase in 1804, and the predecessors of the plaintiff were in possession and paid regularly the Government dues according to the assessment made by the Government

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There is, however, no distinct finding in the judgment of the lower appellate Court as to the way in which the East India Company exercised the right it had under the grants from the

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tion 157 of the Evidence Act allows the statement by way of corroboration to be proved. Section 162 of the Criminal Procedure Code, now in force, enacts that, if any such statement as is now under consideration is taken down in writing, the writing cannot be used as evidence. If it be said that it is a refinement to hold that the writing cannot be admitted, but that the statement, if not reduced to writing, can, the answer is that the Legislature has chosen to alter its language in section 162 of the present Criminal Procedure Code, drawing a distinction between the statement and the writing.

We may add that we have not overlooked the proviso to the present section, but that is confined to and for the benefit of the defence, as the prosecution have free access to all the police papers.

There is nothing, therefore, in the special provision of the existing Code to over-ride the general provisions of the Evidence Act as to the proof by oral evidence of former statements; consequently the oral evidence here objected to was rightly admitted by the lower Court. We may add that, apart from this, there is sufficient evidence on the record to sustain the conviction.

The result is that we affirm the conviction and sentences and dismiss these appeals.

Appeals dismissed.

E. H. M.

ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

IN THE MATTER OF JOGENDRA NATH MUKHUTI AND OTHERS.*

1908
August 13.

Lease—Covenant—Calcutta Municipal Act (Bengal Act III of 1899), s. 556—Tenders, invitation of, when not obligatory—Specific Relief Act (I of 1877), s. 45—Mandamus

Section 556 of the Calcutta Municipal Act enables the Corporation to lease any property vested in them on any terms they think fit, without previously calling for any tenders · however the form of a lease cannot be given to a transaction, which properly falls under section 88 of the Act

Although a covenant in a lease, or in respect of a lease, is in a sense a contract, if it relates to the demised premises and is not independent of them, it does not fall within the purview of section 88 of the Calcutta Municipal Act, and it is not obligatory upon the Corporation to call for tenders in respect of such a contract.

Civil Rule.

This was an application under section 45 of the Specific Relief Act for an order in the nature of a *mandamus* to compel the Municipal Corporation of Calcutta to call for tenders in terms of section 88 of the Calcutta Municipal Act, in respect of the removal of the city refuse, before giving effect to the proposals of the Special Committee appointed by it to consider the matter.

Certain lands and tenements situate at Dhappa, in the Suburbs of Calcutta, known as the "Dhappa Square Mile" with certain other lands, fisheries and fish bit contiguous thereto were vested in the Corporation of Calcutta, and had been used by them for a number of years for the purpose of depositing the refuse of the city.

On May 1st, 1879, one Bhoba Nath Sen obtained a lease of a portion of the said lands and of certain fishing rights from the Corporation and in the following May obtained a lease of the

* Original Civil.

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time of the Permanent Settlement, gave a decree to the plaintiff in the terms prayed for.

The defendants appealed. The learned Special Judge set aside the decree of the first Court and allowed the appeal, observing as follows :—

"The conclusion arrived at by the Settlement Officer was faulty, inasmuch as he found that the tenure held by the tenant at Rs. 2-4-0 was part of one which was held at the time of the Permanent Settlement at Rs. 4-8-0, it having been split up into two since that Settlement.

"Although the aggregate rental of the two tenures so created might not be more than the rental of the original tenure, yet the effect of the division was to create two tenures, that is to say, the tenure held by the plaintiff at Rs. 2-4-0 was a new tenure, which came into existence since the Permanent Settlement, and consequently its rent was variable. The Settlement Officer seemed to have overlooked that section 50, clause (3) of the Bengal Tenancy Act, applied only to the holding of a "raiyat" and not to that of a "tenure-holder.""

From this judgment the plaintiff appealed to the High Court.

Babu Hem Chandra Mitter, for the appellant. The facts proved shew that there was no change in the rent or the rate of rent; for the sake of convenience the original tenure, which was held at Rs. 4-8-0, was divided into two parts bearing an equal *jama* of Rs. 2-4-0. The plaintiff tenure-holder would be entitled, therefore, to the benefit of the presumption under clause (2) of section 50 of the Bengal Tenancy Act. The following cases were referred to: *Soodha Mookhee Dassee* v. *Ramguttee Kurmokar* (1), *Sheikh Mongola* v. *Kumud Chunder Singh* (2), *Raj Kishore Mookerjee* v. *Hureehur Mookerjee* (3) and *Kasheenath Lushkur* v. *Bamasoonduree Debia* (4).

The Advocate-General (*Hon'ble Mr. S. P. Sinha*), (*Babu Basanta Kumar Bose, Babu Mukunda Nath Roy* and *Babu Atul Chandra Dutt* with him), for the respondents. The judgment of the Special Judge is quite sound Section 50 of the Bengal Tenancy Act deals with the protection as against enhancement of rent. Any person claiming that protection must prove that he held the tenure at a rent never changed

(1) (1873) 20 W. R. 419.
(2) (1900) 5 C. W. N. 60.
(3) (1868) 10 W. R. 117.
(4) (1868) 10 W. R. 429.

instance of the Special Committee, the Chairman drew up a report recommending to the Corporation that in order to save unnecessary cost and trouble the lease of the Square Mile and the contract to unload the waggons should be combined, and that a lease of the "Square Mile" should be granted to Bhoba Nath Sen for a period of 22 years, on certain terms, one of the terms being that the lessee should undertake to do the work of unloading the waggons without receiving any separate payment This report was confirmed by the Corporation on the 22nd July 1908

Thereupon, on the 28th July 1908, Jogendra Nath Mukhuti, with two rate-payers of the Corporation, alleging that the Chairman and the Corporation had acted *ultra vires*, applied for and obtained a rule on the Corporation of Calcutta, the General Committee, and the Chairman of the Corporation, and Bhoba Nath Sen to shew cause "why the Chairman and the Corporation should not forbear from accepting the offer of Bhoba Nath Sen, until after tenders had been invited in accordance with law and why the General Committee of the Corporation should not give notice by advertisement in local newspapers inviting tenders for the contract for unloading waggons of refuse at the lands called the Dhappa Square Mile, and for the lease of the lands and tenements situate at Dhappa known as and called the Dhappa Square Mile and also for the lease of certain other lands and fisheries and fish hât contiguous thereto and why the Chairman and the Corporation should not otherwise proceed in accordance with law"

The Rule came on for hearing on the 10th August 1908.

The Advocate-General, Mr. Sinha (Mr. Stokes with him) for the Corporation. In the circumstances of this matter, the Corporation has full discretion to grant a lease of the premises and to arrange for the unloading of the refuse-waggons without inviting tenders. Section 88 of the Calcutta Municipal Act has no application. The work of unloading is intimately connected with the demised premises, and the

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affected by the fact of the land having been separated from other land, which formed with it a single holding. The plaintiff's predecessors held under a contract with the landlord with regard to one tenure bearing a rental of Rs. 4-8-0, which in 1884 was split up into two tenancies each bearing a rent of Rs. 2-4-0. It is contended on behalf of the plaintiff that as a matter of fact there has been no change either in the rent or in the rate of rent. What has been done is that, for the sake of convenience, the old tenure has been divided into two bearing an equal *jama*. But as a matter of fact since 1884 there have been two tenancies, not under the contract under which the old tenure was held, but under a new contract between the landlord and the tenure-holder. These two tenancies are two distinct tenancies under a different contract, and for payment of arrears of rent separate suits have to be brought. It cannot be said that the old tenure still exists in the shape of these two new tenancies. The words "so far as it relates to land held by a raiyat" in section 50, sub-section (3) clearly imply that the operation of the section so far as it relates to land held by a tenure-holder, is affected by the separation of the land from other land, which formed with it a single tenure.

Under these circumstances, we think that the judgment of the Special Judge is unassailable. This appeal is accordingly dismissed with costs.

Appeal dismissed.

R. D. B.

WOODROFFE J. This is an application for an order in the nature of a *mandamus* to compel the Corporation to call for tenders in respect of the removal of the city refuse before giving effect to the proposals of the Special Committee appointed by it to consider the matter This work has been done by Babu Bhoba Nath Sen since 1879 and has been carried out to the satisfaction of the Corporation. He has also during this period held a lease of the Dhappa Square Mile into which the refuse is dumped The Corporation consider that it is advisable that the benefit of the lease and the discharge of the work of unloading should go to and be done by the same person As the present lessee's lease will expire next year the question of its renewal has been before the Secretary of the Corporation, the Estates and General Purposes Committee and a Special Committee, and they after a full consideration of the matter have reported that it is advisable that the lease of the Square Mile and the work of the removal of city refuse should go together and be granted and made over to Babu Bhoba Nath Sen. The present proposals are however for a different arrangement than heretofore. At the present time Babu Bhoba Nath Sen pays a rental for the land and receives a sum of money for the work done by him It is proposed now to grant him a lease on the terms that he do the work of unloading without charge. This proposal is about to be put before the Corporation Another person, who desires to get for himself the contract for the unloading of the city refuse, objects to this being done. He and a ratepayer, whom he has associated with himself, say that the proposal of the Select Committee cannot be accepted without first calling for tenders If there is a discretion in the matter, then the Corporation have full discretion. They know far better than I do what is the best proposal to adopt in the public interest. There is no reason whatever to suppose that they are not guided solely by the requirements of such interest. The charges made on this head in the petition are ridiculous. The point however before me is this, and it is a bare point of law, *viz.*: Is the discretion of the Corporation

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consignments. The defendants duly accepted this bill payable twelve months after date to save the trouble of renewal, and this extension was assented to by the plaintiffs. The plaintiffs discounted the bill with the bankers Messrs. Cox & Co. and indorsed the bill to their order. A further indorsement appeared on the back of the bill purporting to be made by Cox & Co. in favour of the Allahabad Bank. The bill was presented for payment on maturity, was dishonoured and was duly protested for non-payment. Thereupon Messrs. Cox & Co. debited the account of the plaintiffs with the amount of the bill and returned the bill to the plaintiffs, without re-indorsing the bill in their favour.

The defendants admitted acceptance of the bill and that it was dishonoured on maturity, but took the plea that the plaintiffs had not established any cause of action against the defendants, inasmuch as the bill had been indorsed to Messrs. Cox & Co. or order, and the latter had not indorsed it back to the plaintiffs and that in consequence the plaintiffs had no right to recover on the bill.

Mr. Camell (*Mr. Stokes* with him) for the plaintiffs. The plaintiffs-drawers have the right to sue the defendants-acceptors on the bill. Messrs. Cox & Co. the indorsees returned the bill to the drawers as useless, and by so doing abandoned their rights on the bill. See Byles on Bills, 16th edition, page 200. The plaintiffs' account with Cox & Co. was debited with the amount of the bill, and they looked to the acceptors. Each party to a bill is a principal debtor to every succeeding party and can be proceeded against as such. See Negotiable Instruments Act, sections 35, 37. Nothing has occurred to extinguish the acceptors' liability to the drawers. The indorsement did not amount to an absolute transfer of all the right, title and interest of the drawers in the bill to the indorsees. The drawer is in the position of a surety for the acceptor in respect of an indorsee, and would on payment be relegated to the rights of the indorsee. Again, by section 32 of the Negotiable Instruments Act, " the acceptor of a bill

WOODROFFE J. This is an application for an order in the nature of a *mandamus* to compel the Corporation to call for tenders in respect of the removal of the city refuse before giving effect to the proposals of the Special Committee appointed by it to consider the matter This work has been done by Babu Bhoba Nath Sen since 1879 and has been carried out to the satisfaction of the Corporation. He has also during this period held a lease of the Dhappa Square Mile into which the refuse is dumped The Corporation consider that it is advisable that the benefit of the lease and the discharge of the work of unloading should go to and be done by the same person *As the present lessee's lease will expire next* year the question of its renewal has been before the Secretary of the Corporation, the Estates and General Purposes Committee and *a Special Committee, and they after a full con*sideration of the matter have reported that it is advisable that the lease of the Square Mile and the work of the removal of *city refuse should go together and be granted and made over* to Babu Bhoba Nath Sen The present proposals are however for a different arrangement than heretofore. At the present time Babu Bhoba Nath Sen pays a rental for the land and receives a sum of money for the work done by him It is proposed now to grant him a lease on the terms that he do the work of unloading without charge This proposal is about to be put before the Corporation Another person, who desires to get for himself the contract for the unloading of the city refuse, objects to this being done. He and a ratepayer, whom he has associated with himself, say that the proposal of the Select Committee cannot be accepted without first calling for tenders If there is a discretion in the matter, then the Corporation have full discretion. They know far better than I do what is the best proposal to adopt in the public interest. There is no reason whatever to suppose that they are not guided *solely by the requirements of such* interest. The charges made on this head in the petition are ridiculous. The point however before me is this, and it is a bare point of law, *viz.*: Is the discretion of the Corporation

1908

JAMESON & Co. v. SCOTT.

HARINGTON J.

On the back of the bill there appears a further indorsement purporting to be made by Cox & Co. in favour of the Allahabad Bank, but as to that indorsement no evidence of any sort has been given and so far as the case stands the drawer indorsed the bill to the order of Cox & Co. It has also been proved that Cox & Co. discounted the bill and credited the plaintiff with the proceeds, and when the bill was dishonoured Cox & Co. debited the drawers' account with the amount of the bill. It has also been proved that after dishonour and after the account of the drawer had been debited with the amount of the bill, the bill was returned to the drawer by Cox & Co. Under these circumstances the defendant says that the plaintiff has no right to recover, because the bill was indorsed to Cox & Co. or order, and Cox & Co. have not indorsed it back to the plaintiff. The answer, I think, is that the plaintiff is suing by virtue of being a party to the bill and is suing the acceptor on the contract contained in the bill between himself and the acceptor. From the fact that the drawer's account was debited with the amount of the bill and the bill was sent back to the drawer, I infer that Cox & Co. returned it to the drawer as a bad bill and left the drawer to take any course they thought proper with regard to it, they having protected their loss by debiting the drawer's account with the amount.

Under these circumstances, is the drawer entitled to sue the acceptor? He has possession of the bill. The bill expresses what the acceptor agreed to do as between himself and the drawer. In my opinion the drawer is entitled to sue the acceptor, who has failed to carry out the agreement he entered into under the terms of the bill. It has been argued that, if the holder of a bill is entitled to sue the acceptor, the result would be that, if the bill now got back into the hands of Cox & Co., they, as indorsees, would still be entitled to sue the acceptor. I do not think that argument is well-founded and for this reason:—They would have no greater rights on the bill, if they took it now, than the person from whom they got it; and if they took it from the plaintiff, who had sued for

otherwise would be to prohibit the Corporation from granting a lease without calling for tenders which the law does not require. The rule is accordingly discharged with costs.

As the rule was served on Babu Bhoba Nath Sen and as in my opinion the latter was entitled to be heard separately, separate costs are allowed to him and to the other party to the rule, the Corporation.

Rule discharged.

Attorney for the applicants *S. C. Mitter.*
Attorney for the Corporation: *M. L. Sen.*
Attorneys for the lessee *G. C. Chunder & Co.*

J. C.

1908

HARI CHARAN SANT v. KAILASH CHANDRA BHUYAN.

MACLEAN C. J.

criminal case as false and finding that there was no reasonable and probable cause for lodging the criminal complaint, that the defendant took an active and material part in the prosecution, and that the Magistrate treated the defendant as the virtual prosecutor. He therefore held him liable for damages and allowed Rs 15 to each of the accused as a *solatium*, besides other amounts for costs for processes and for engaging a mukhtear.

Babu Shiva Prasanna Bhattacharya for the appellant. Everything depends on the meaning of the word 'prosecute.' See Clarke and Lindsell on Torts, page 641 *Narasinga Row* v. *Muthaya Pillai* (1), *Dudhnath Kandu* v. *Mathura Prasad* (2), *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (3) are all in my favour. [Maclean C. J But the findings of fact are against you.]

I did not set the law in motion. There is no charge that I misled the police. *Bhul Chandra Patro* v *Palun Bas* (4) proceeds on the basis that there was want of reasonable and probable cause and is distinguishable from this case. Here the case is the other way *Abrath* v *The North Eastern Railway Company* (5) cited in the case cited above has no bearing. [Maclean C. J *Fitz-John* v. *MacKinder* (6) is against you] *Wyatt* v. *White* (7) is in my favour My client was interested in watching the proceedings and therefore appointed a *mukhtear*. It is really the Court inspector, who prosecuted. See also Criminal Procedure Code, sections 593 and 594.

Mr. G. Sarkar for the respondents was not called upon.

MACLEAN C. J. This is an action for malicious prosecution. The defendant, it appears, gave information to the police, upon which the plaintiff was arrested and brought before the Magistrate and subsequently acquitted. The case comes

(1) (1902) I L. R 26 Mad. 362.
(2) (1902) I L. R 24 All. 317.
(3) (1872) 11 B. L. R. 321.
(4) (1903) 12 C. W. N. 818, foot note.
(5) (1883) L. R. 11 Q B D. 440; L. R. 11 App. Cases 247.
(6) (1861) 9 C. B. N. S. 505, 533.
(7) (1860) 29 L. J. Exch. D. 193.

APPELLATE CRIMINAL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Carnduff.

FANINDRA NATH BANERJEE
v.
EMPEROR.*

1908
November 28

Charge—Jury—Heads of charge—Contents of, and time of recording heads of charge—Misdirection of Jury—Omission to read whole of the depositions of witnesses—Omission to direct Jury to draw a "presumption" against the prosecution, when certain witnesses were not called—Direction in rioting cases—Oral proof of statements by witnesses to the police—Criminal Procedure Code (Act V of 1898), ss 162, 297, and 367—Circular Orders of the High Court, Chap. I, Order 59—Evidence Act (I of 1872) ss 114, Ill. (g) and 157—Indian Penal Code (Act XLV of 1860) ss 141, and 149.

It is not necessary that the heads of charge to the Jury should be reduced to writing before delivery of the charge, but they ought to be written as soon as possible thereafter and when the facts are fresh in the Judge's mind.

The heads of charge should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court on appeal to see distinctly, whether the case was fairly and properly placed before the Jury. *Circular Orders of the High Court, Chap I, Order 59*, referred to

It is not incumbent on the Judge to read the whole of the depositions of the witnesses to the Jury It is enough that references have been made to them so as to sufficiently attract their attention to them.

It is not necessary that the Judge should direct the Jury, in so many words, that the omission of the prosecution to call certain witnesses raised a "presumption," under the Evidence Act (I of 1872), s. 114, *Ill.* (*g*), that their evidence would be unfavourable to the Crown, if he has pointed out that the Jury might properly draw any inference they pleased from such omission

Section 141 of the Penal Code is sufficiently explained to the Jury, if the Judge has told them that, if five persons go in a body with the common object of murdering a man, and if he is killed in the prosecution of the common object, then, no matter who struck the fatal blow, all are equally guilty of murder under ss $\frac{302}{114}$ of the Penal Code.

Section 162 of the present *Criminal Procedure Code* prohibits the use of the record of the statement of a witness taken under section 161 as evidence, but does not over-ride the general provisions of the Evidence Act as to proof of such statement by oral evidence, and such statement is admissible

* Criminal Appeals Nos. 693—695 of 1908, against the order of L. Palit, Sessions Judge of Jessore, dated the 5th of June 1908.

in such cases. The medical evidence was substantially dealt with in the Judge's charge S. 162 of the Code does not over-ride the general rule in s 157 of the Evidence Act. See *Reg.* v *Uttamchand Kapurchand* (1) and *Empress* v *Kali Churn Chunari* (2).

MACLEAN C J. and CARNDUFF J. These cases were tried before a Judge and Jury. The Judge agreeing with a majority of the Jury, four to one, convicted the prisoners of an offence under section 302 read with section 149 of the Indian Penal Code, and sentenced them to transportation for life The appeals, therefore, cannot succeed, unless the appellants can satisfy us that there was some misdirection by the learned Judge in his charge to the Jury The first criticism upon the action of the Judge is that, whilst the verdict was delivered on the 29th May 1908, and the sentence was passed on the 5th June following, his charge to the Jury was not written out until the 29th June. Reference has been made to section 367 of the Code of Criminal Procedure. That section does not assist the appellants, for there is a proviso that " in trials by Jury, the Court need not write a judgment, but the Court of Session should record the heads of the charge to the Jury." There is nothing there as to when it must be written, as in the case of a judgment by the Court dealt with in a preceding part of the section If we refer to the Circular Orders of this Court, Chapter I, Order 59, we find an express order to the effect that it is not necessary that the direction to the Jury should be reduced to writing before delivery, but it is essential that the "heads of charge" (section 367) placed upon the record should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court, in the event of an appeal, to see distinctly, whether the case was fairly and properly placed before the Jury. Whilst, therefore, there is nothing in the point to assist the appellants, we think it is very unsatisfactory that the charge to the Jury was not, in the case before us, written out until

(1) (1874) 11 Bom. H. C. 120. (2) (1881) I. L. R. 8 Calc. 154.

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the police by a witness to corroborate that witness's deposition at the trial The appellant relies upon two reported cases, namely, *Queen-Empress* v. *Bhairab Chunder Chuckerbutty,* (1) and the Full Bench case of *Emperor* v. *Narayan Raghunath Patki* (2).

In the former it was held that the general provisions of section 157 of the Indian Evidence Act of 1872 were over-ridden by the special provisions of section 162 of the Code of Criminal Procedure. But the Code then under consideration was the Code of 1882; the language of the corresponding section 162 of the present Code is materially different. That case is, consequently, distinguishable In the other case the point now raised was not decided by the Full Bench in Bombay or before the Court, though there are some *obiter dicta* upon it by one of the learned Judges, Mr. Justice Beaman.

The language of the respective Codes of 1872, 1882 and 1898 are different. In that of 1872 section 119 enacted.—"No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence." Section 162 of the Code of 1882, on the other hand, was thus expressed —"No statement, other than a dying declaration, made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced to writing, be signed by the person making it or be used as evidence against the accused." The present section 162 provides that :—"No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall *such writing* be used as evidence"

In the case of *Reg* v *Uttamchand Kapurchand* (3) it was held that the provisions of section 155 of the Indian Evidence Act of 1872 were not controlled by section 119 of the Act of 1872, the Criminal Procedure Code then in force. This view was approved of by Wilson J in *Empress* v *Kali Churn Chunari* (4). The point may be shortly summed up thus. Sec-

(1) (1898) 2 C. W. N 702.
(2) (1907) I. L. R. 32 Bom. 111
(3) (1874) 11 Bom. H. C. 120.
(4) (1881) I L. R. 8 Calc. 154.

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APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr Justice Coxe.

UDOY CHANDRA KARJI.

v.

NRIPENDRA NARAYAN BHUP.*

1909
Jan. 13.

Bengal Tenancy Act (VIII of 1885) ss. 50, 106—Presumption as to amount of rent—Permanent tenure

The plaintiff's predecessors held a tenure from long before the Permanent Settlement at a rental of Rs 4 8-0 In 1884 the tenure was split up into two tenancies each bearing a rental of Rs 2-4-0. In the Record of Rights of 1906 the tenure was described as not held at a fixed rent The plaintiff brought a suit under s. 106 of the Bengal Tenancy Act claiming the tenure to be a permanent one, and the rent as fixed in perpetuity —

Held, that the old tenure did not still exist in the shape of the two new tenancies, the land held by the tenure holder being affected by the division, under clause (3) of section 50 of the Bengal Tenancy Act.

SECOND Appeal by Udoy Chandra Karji, the plaintiff.

The plaintiff was a tenure-holder in respect of a *jote* paying a rental of Rs 2-4-0 In the record of rights, which was prepared in 1906, the tenure in question had been recorded by the Settlement Officer as not permanent and not held upon a fixed rent. Thereupon, the plaintiff brought a suit under section 106 of the Bengal Tenancy Act claiming the rent to be fixed in perpetuity and not liable to enhancement

It appears, that the plaintiff's predecessors held the original tenure, since long before the Permanent Settlement, at a rental of Rs. 4-8-0 for the entire tenure In 1884 the tenure was split up into two, each bearing a rent of Rs 2-4-0

The defendants contended that the rent was not fixed, nor was the tenure permanent

The Settlement Officer having found that the plaintiff had held the tenure practically on an unaltered rental since the

* Appeal from Appellate Decree, No. 2364 of 1907, against the decree of Bernard V Nicholl, Special Judge of Rungpur, dated June 18, 1907, reversing the decree of Sayed Ejhar Hussain, Settlement Officer of that District, dated Dec. 22, 1906.

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1909

UDOY CHANDRA KAPJI *v.* NRIPENDRA NARAYAN BHUP

from the time of the Permanent Settlement. When a tenure is split up since the original settlement, it becomes a new contract. In this case the settlement is split up into two, and it becomes two contracts in the place of one original contract. Formerly, one suit was necessary for realization of the arrears of rent, now two suits have to be brought for the same purpose since the splitting up of the rent. The tenure was divided into two in 1884, and hence the protection under section 50 of the Tenancy Act cannot be claimed in this case. Under clause (3) of section 50 of the Act a tenure-holder cannot claim that protection

Babu Hem Chandra Mitter, in reply

SHARFUDDIN AND COXE JJ The plaintiff is the appellant A record of rights having been prepared the plaintiff was recorded in it as a tenure-holder and his tenure as not held at a fixed rent. He then brought a suit under section 106 of the Bengal Tenancy Act before the Settlement Officer, who decreed the suit and held that the tenure of the plaintiff was very old, in fact, existing from a period of 150 years before 1894. On the defendant appealing to the Subordinate Judge, that learned Officer held that, inasmuch as the original tenure, of which the rent was 4 Rupees 8 annas, was split up into two tenancies in 1291 (1884), that old tenure ceased to exist and under the new contract instead of that old tenure there sprang up two new tenancies at the rental of Rs. 2-4-0 each On that ground he held that the plaintiff was not entitled to claim that his tenure had existed from the time of the Permanent Settlement

Our attention has been drawn to clause (2) of section 50 of the Bengal Tenancy Act by the learned pleader for the plaintiff appellant, and it has been contended that the presumption arises in favour of the plaintiff's contention, under that section But we find that clause (3) of that section, which is a special protection for raiyats, provides that the operation of section 50 so far as it relates to lands held by a raiyat shall not be

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ORIGINAL CIVIL.

Before Mr. Justice Harington

JAMESON & Co.
v.
SCOTT.*

1908
November 10.

Bill of exchange—Return of bill by indorsee to drawer—Re indorsement, whether, necessary—Drawer's right of action against acceptor.

A bill of exchange drawn by J. & Co to their order was accepted by S. and was endorsed by J. & Co to C., who discounted the bill. The bill was presented at maturity and was dishonoured, whereupon C debited J. & Co.'s account with the amount of the bill, and returned the bill to them, but without re-indorsement. On an action by J. & Co. against S on the bill.

Held, that the drawers had the right to sue the acceptor on the bill, by virtue of being a party to the bill and as suing on the contract contained in the bill between themselves and the acceptor.

ORIGINAL SUIT.

THIS was a suit on a bill of exchange for the sum of £471-4-3, instituted by Messrs. John Jameson, Ltd , the drawers of the bill, against the defendants, the acceptors thereof

By a written agreement, dated the 3rd September 1906, Messrs. John Jameson, Ltd., a London firm carrying on business as Wholesale Wine Merchants and Distillers, appointed the firm of Messrs. Elliott & Co , of which firm J W Scott was a member, their sole agents in India for the term of seven years, for the sale of certain spirits and wines, and it was provided that the defendants should pay for the wines and spirits supplied to them by bill at six months, but that during the first year only the plaintiffs were to renew any of the bills coming due for a further period of six months, if desired by the defendants.

During September 1906 the plaintiffs despatched four consignments of wines and spirits to the defendants. On the 25th September 1906, the plaintiffs drew a bill of exchange to their order for £471-4-3 at six months' sight in respect of these

* Original Civil Suit No. 183 of 1908

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The Punjab and North-West Code, Edition, 1903, consisting of the unrepealed enactments locally in force in the Punjab and the North-West Frontier Province, with appendix and index ...	6	0	0	[10a.]

II.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL, AS MODIFIED BY SUBSEQUENT LEGISLATION.

	Rs.	A.	P.	
Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1898 (with footnotes brought down to 1st December, 1901)	0	7	0	[1a.]
Act XX of 1847 (Copyright), as modified up to 1st December, 1903	0	5	0	[1a.]
Act XIX of 1850 (Apprentices), as modified up to 1st May 1905	0	3	6	[1a.]
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	0	2	6	[1a.]
Act VIII of 1851 (Tolls on Roads and Bridges), as modified up to 1st June, 1897	0	2	6	[1a.]
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	0	2	0	[1a.]
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904	0	1	0	[1a.]
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903	0	2	0	[1a.]
Act XXVIII of 1855 (Usury Laws Repeal), as modified up to 1st December, 1903	0	1	6	[1a.]
Act XX of 1856 (Police Chaukidars), as modified up to 1st November, 1903	0	7	0	[1a.]
Act IV of 1857 (Tobacco, Bombay Town), as modified up to 1st August, 1895	0	8	9	[1a.]
Act XXIX of 1857 (Land Customs Bombay), as modified up to 1st December, 1895	0	4	0	[1a.]
Act III of 1858 (State Prisoners), as modified up to 1st August, 1897	0	2	0	[1a.]
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903	0	4	3	[1a.]
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903	0	2	2	[1a.]
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	0	5	0	[1a.]

of exchange at or after maturity is bound to pay the amount thereof to the holder on demand," and section 8 defines the term "holder," within which definition, it is submitted, the plaintiffs come. See also section 59 If the bill had been re-indorsed to the plaintiffs, they would have had the right to sue as indorsees: but without indorsement, they have in their original capacity as drawers a right of action on the bill. See *Simmonds* v. *Parminter* (1), *Pownal* v. *Ferrand* (2) and *In re Overend Gurney & Co., Exparte Swan* (3) and Chitty on Pleading, Vol. II, page 102.

Mr. C. R. Das (*Mr. B. L. Mitter* with him) for the defendants. When the plaintiffs indorsed the bill by a special indorsement in favour of Cox & Co., all the right, title and interest in the bill passed from the plaintiffs to Cox & Co. Thereupon Cox & Co. alone had the right to sue on the bill. A negotiable instrument can be transferred only in one way, by indorsement and delivery. See *Harrop* v. *Fisher* (4) and *Whistler* v. *Forster* (5). Hence, until the bill has been re-indorsed to the plaintiffs, they can have no cause of action on the bill. Otherwise, if after this suit the bill got back into the hands of Cox & Co. they, as indorsees, would still be entitled to sue the acceptor. Even if the bill is considered as in the nature of an actionable claim, under section 130 of the Transfer of Property Act, the transfer of such a claim can only be effected by the execution of an instrument in writing The plaintiff cannot now purport to sue as a surety, as no such case was made in the plaint.

HARINGTON J. This is an action by the drawer of a bill-of-exchange against the acceptor It is admitted that the bill was accepted by the defendant and that it was dishonoured at maturity. The bill was drawn to the order of the plaintiff and was indorsed by the plaintiff to the order of Cox & Co.

(1) (1747) 1 Wils. Rep 185.
(2) (1827) 6 B. & C. 439
(3) (1868) L. R 6 Eq 344, 362.
(4) [1861] Scott. N S 186.
(5) [1863] Scott N S. 248, 256.

	Rs.	A.	P.	
Act XV of 1877 (Limitation), as modified up to 31st December, 1900	0	12	0	[2a.]
Act VI of 1878 (Treasure Trove), as amended by Act XII of 1891	0	2	6	[1a.]
Act VII of 1878 (Forests), as modified up to 1st December, 1903	0	10	0	[2a.]
Act VIII of 1878 (Sea Customs), as modified up to 1st February, 1904 ...	1	6	3	[4a.]
Act XI of 1878 (Arms), as to modified up to 1st May, 1904 ...	0	6	0	[1a. 6p.]
Act XVII of 1878 (Ferries), as modified up to 1st June, 1902 ...	0	6	0	[1a. 6p.]
Act XVII of 1879 (Dekkhan Agriculturists' Relief), as modified up to 1st March, 1895 ...	0	10	0	[2a.]
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896 ...	0	7	6	[1a.]
Act VII of 1880 (Merchant Shipping), as modified up to 15th October, 1891 ...	0	10	0	[2a.]
Act V of 1881 (Probate and Administration), as modified up to 1st July, 1890 ...	0	12	0	[2a.]
Act XV of 1881 (Factories), as modified up to 1st December, 1904	0	5	6	[1a. 6p.]
Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st August, 1897 ...	0	10	0	[1a.]
Act XVIII of 1881 (Central Provinces Land-revenue), as modified up to 1st March, 1905 ...	1	2	0	[2a.]
Act II of 1882 (Trusts), as modified up to 1st June, 1903 ...	0	10	0	[1a.]
Act IV of 1882 (Transfer of Property), as modified up to 1st December, 1905 ...	0	15	0	[2a.]
Act V of 1882 (Indian Easements), as amended by the Repealing and Amending Act, 1891 (XII of 1891) ...	0	8	0	[1a.]
Act XII of 1882 (Salt), as modified up to 1st December, 1890 ...	0	6	0	[1a.]
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899 ...	6	0	0	[6a.]
Act V of 1883 (Indian Merchant Shipping), as modified up to 1st December, 1904 ...	0	6	0	[1a.]
Act VIII of 1883 (Little Cocos and Preparis Island), as modified up to 1st October, 1902 ...	0	1	6	[1a.]
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902 ...	0	11	0	[2a.]
Act IV of 1884 (Explosives), as modified up to 1st December, 1903 ...	0	4	9	[1a.]
Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891 ...	0	9	0	[2a.]
Act VII of 1884 (Steam-ships), as modified up to 1st July, 1890...	0	6	0	[1a.]
Act XII of 1884 (Agriculturists' Loans), as modified up to 15th December, 1896 (with footnotes brought down to 1st February, 1903) ...	0	2	0	[1a.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899 ...	0	7	0	[1a.]
Act XIII of 1885 (Indian Telegraph), as modified up to 1st March, 1905 ...	0	5	0	[1a.]
Act II of 1886 (Income-tax), as modified up to 1st April, 1903...	0	8	0	[1a. 6p.]
Act VI of 1886 (Births, Deaths, and Marriages Registration), as modified up to 1st June, 1891 ...	0	6	0	[1a.]

and recovered judgment on the bill they would not be entitled to recover from the acceptor. The result is there must be judgment for the plaintiff for the amount shown on the bill. There will be interest on the bill from the 28th September 1907 at 6 per cent and interest on decree at 6 per cent. The defendant must pay the plaintiff's costs.

Suit decreed.

Attorneys for the plaintiffs : *Orr, Dignam & Co.*
Attorney for the defendant : *M. N. Dutt.*

J. C.

	Rs.	a.	p.	
Regulation VI of 1886 (Ajmer Rural Boards), as modified up to 1st February, 1897	0	5	6	[1a.]
Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1891	0	5	0	[1a.]
Regulation V of 1893 (Sonthal *Parganas Justice*), as modified up to 1st October, 1899	0	4	9	[1a.]
Regulation I of 1895 (Kachin Hill Tribes), as modified up to *1st April, 1902*	0	6	0	[1a.]

III.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts unrepealed) of the Governor-General of India in Council from 1834 to 1904.

Regulations made under the Statute 33 Vict., Cap. 3, from No. II of 1875 to 1904. 8vo, stitched.

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Act XX *of* 1847 (Copyright), as modified up to 1st May, 1896	In Urdu ...	0	1	3	[1a.]
	„ Nagri ...	0	1	3	[1a.]
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	In Urdu ...	0	0	6	[1a.]
	„ Nagri ...	0	0	6	[1a.]
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	In Urdu ...	0	0	6	[1a.]
	„ Nagri ...	0	0	6	[1a.]
Act XII *of* 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904 ...	In Urdu ...	0	0	3	[1a.]
	„ Nagri ...	0	0	3	[1a.]
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903	In Urdu ...	0	0	6	[1a.]
	„ Nagri ...	0	0	6	[1a.]
Act XX *of* 1856, as modified up to 1st November, 1903	In Urdu ...	0	2	6	[1a.]
	„ Nagri ...	0	2	6	[1a.]
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903 ...	In Urdu ...	0	1	0	[1a.]
	„ Nagri ...	0	1	0	[1a.]
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903 ...	In Urdu ...	0	1	0	[1a.]
	„ Nagri ...	0	1	0	[1a.]
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	In Urdu ...	0	1	6	[1a.]
Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874 ...	In Urdu ...	0	0	3	[1a.]
	„ Nagri ...	0	0	3	[1a.]
Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December, 1904	In Urdu ...	0	0	3	[1a.]
	„ Nagri ...	0	0	3	[1a.]
Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903	In Urdu ...	1	5	0	[5a.]
	„ Nagri ...	1	5	0	[5a.]
Act V of 1861 (Police), as modified up to 7th March, 1903	In Urdu ...	0	2	9	[1a.]
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Act XXI of 1885 (Madras Civil Courts Amendment)	In Urdu ...	0	0	3	[1a.]
Act II of 1886 (Income-tax), as modified up to 1st April, 1903	In Urdu ...	0	8	0	[1a. 9p.]
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Act VII of 1886 (Registration Amendments)	In Urdu ...	0	0	3	[1a.]
Act X of 1886 (Criminal Law Amendment)	In Urdu ...	0	0	9	[1a.]
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	„ Nagri ...	0	3	3	[1a.]
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891	In Urdu ...	0	0	9	[1a.]
	„ Nagri ...	0	0	9	[1a.]
Act VI of 1887 (Companies Amendment)	In Urdu ...	0	0	3	[1a.]
Act VII of 1887 (Suits Valuation) ...	In Urdu ...	0	0	9	[1a.]
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896 ...	In Urdu ...	0	2	3	[1a.]
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Act X of 1887 (Native Passenger Ships) ...	In Urdu ...	0	1	6	[1a.]
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts) ...	In Urdu ...	0	1	3	[1a.]
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	„ Nagri ...	0	3	6	[1a.]
Act XV of 1887 (Burma Military Police) ...	In Urdu ...	0	0	9	[1a.]
	„ Nagri ...	0	0	9	[1a.]
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Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment).	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	3	[1a.]
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	„ Nagri ...	0	1	0	[1a.]
Act VI of 1896 (Indian Penal Code Amendment)	In Urdu ...	0	0	8	[1a.]
Act VIII of 1896 (Inland Bonded Warehouses)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act XII of 1896 (Excise), as modified up to 1st August, 1905	In Nagri ...	0	8	8	[1a.]
Act I of 1897 (Act XXXVII of 1850 Amendment)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act II of 1897 (Criminal Tribes Act Amendment)	In Urdu ...	0	0	8	[1a.]
Act III of 1897 (Epidemic Diseases) ...	In Urdu ...	0	0	8	[1a.]
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Act VI of 1897 (Negotiable Instruments Act Amendment)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
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	„ Nagri ...	9	0	9	[1a.]
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903	In Urdu ...	0	0	9	[1a.]
	„ Nagri ...	0	0	9	[1a.]
Act X of 1897 (General Clauses)	In Urdu ...	0	1	0	[1a.]
	„ Nagri ...	0	1	0	[1a.]

Act		Rs.	A.	P.	
Act I of 1900 (Indian Articles of War Amendment)	In Urdu ...	0	0	8	[1a.]
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Act IV of 1900 [Indian Companies (Branch Registers)]	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act IX of 1900 (Amendment of Court-fees Act, 1870)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act X of 1900 (Census)	In Urdu ...	0	0	9	[1a.]
	„ Nagri ...	0	0	9	[1a.]
Act XI of 1900 (Limitation)	In Urdu ...	0	0	8	[1a.]
Act II of 1901 [Indian Tolls (Army)] ...	In Urdu ...	0	0	6	[1a.]
	„ Nagri ...	0	0	9	[1a.]
Act III of 1901 (Indian Ports)	In Urdu ...	0	0	8	[1a.]
Act V of 1901 [Indian Forest (Amendment)]	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act VI of 1901 (Assam Labour and Emigration)	In Urdu ...	0	5	0	[2a.]
	„ Nagri ...	0	5	0	[2a.]
Act VII of 1901 (Native Christian Administration of Estates)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act VIII of 1901 (Mines)	In Urdu ...	0	1	0	[1a.]
	„ Nagri ...	0	1	0	[1a.]
Act IX of 1901	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act X of 1901	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act II of 1902 [Cantonments (House-Accommodation)]	In Urdu ...	0	1	0	[1a.]
	„ Nagri ...	0	1	0	[1a.]
Act IV of 1902 (Indian Tramways) ...	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act V of 1902 (Administrators-General and Official Trustees)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act VII of 1902 [United Provinces (Designation)]	In Urdu ...	0	0	8	[1a.]
Act VIII of 1902 (Indian Tariff)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act II of 1903 (Indian Post Office Amendment)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
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	„ Nagri ...	0	2	6	[1a. 6p.]
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	„ Nagri ...	0	0	8	[1a.]
Act VII of 1903 (Works of Defence) ...	In Urdu ...	0	1	8	[1a.]
	„ Nagri ...	0	1	8	[1a.]
Act VIII of 1903 (Probate and Administration)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act IX of 1903 (Tea Cess)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act X of 1903 (Victoria Memorial) ...	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act XIII of 1903 (Lepers)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act XIV of 1903 (Indian Foreign Marriages	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]

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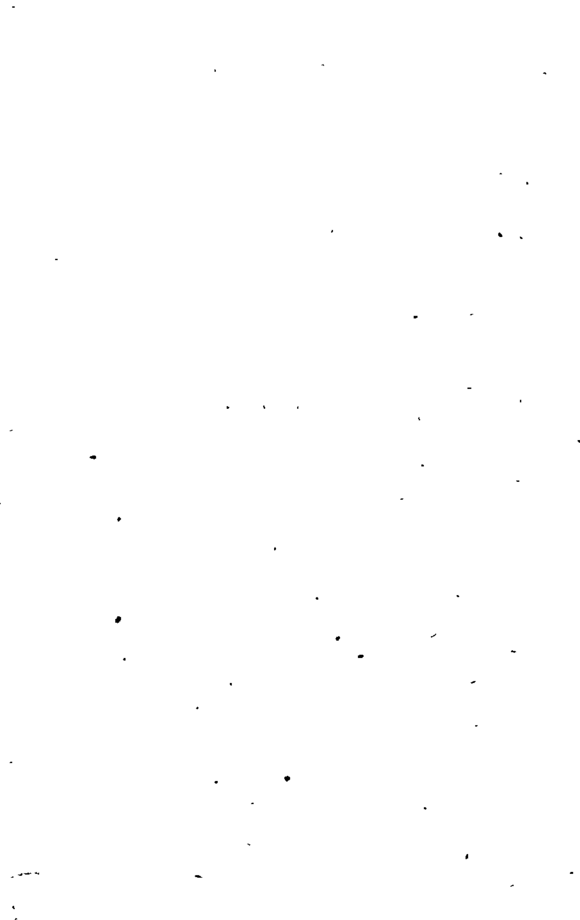
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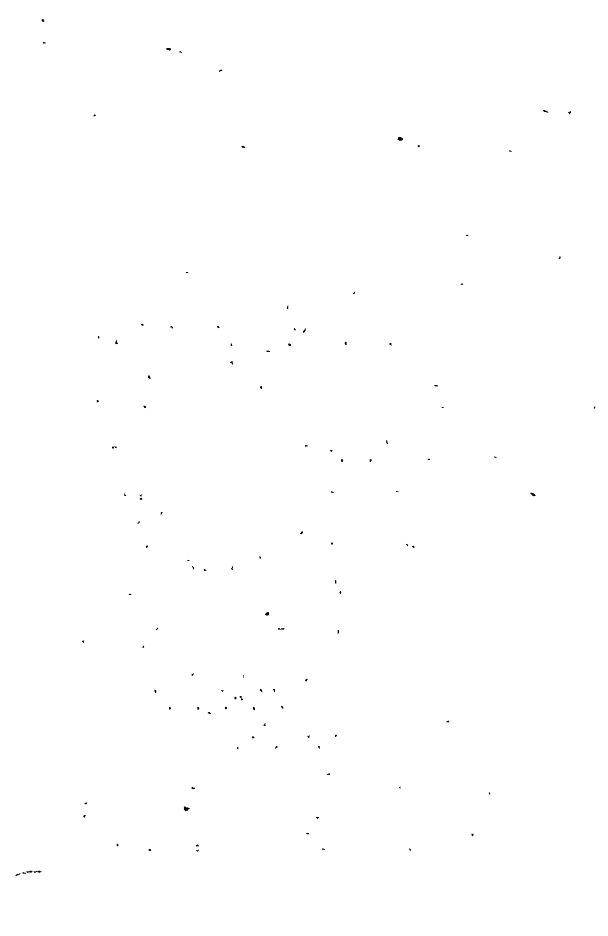
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	„ Nagri	...	0	0	3	[1a.]
Act XXIV of 1899 (Central Provinces Court of Wards) ...	In Urdu	...	0	1	3	[1a.]
	„ Nagri	...	0	1	3	[1a.]



			Rs.	a.	p.	
Act XV of 1903 (Extradition), as modified up to 1st December 1904	In Urdu	...	0	1	9	[1a.]
	" Nagri	...	0	1	9	[1a.]
Act XVI of 1903 (Central Provinces Municipal)	In Urdu	...	0	4	0	[1a. 6p.]
	" Nagri	...	0	4	0	[1a. 6p.]
Act I of 1904 (Poisons)	In Urdu	...	0	0	6	[1a.]
	" Nagri	...	0	0	6	[1a.]
Act III of 1904 (Local Authorities Loan) ..	In Urdu	...	0	0	8	[1a.]
	" Nagri	...	0	0	8	[1a.]
Act IV of 1904 (North-West Border Military Police)	In Urdu	...	0	0	9	[1a.]
Act VI of 1904 [Transfer of Property (Amendment)]	In Urdu	...	0	0	8	[1a.]
	" Nagri	...	0	0	8	[1a.]
Act VII of 1904 (Ancient Monuments Preservation	In Urdu	...	0	0	9	[1a.]
	" Nagri	...	0	0	9	[1a.]
Act VIII of 1904 (Indian Universities) ...	In Urdu	...	0	1	8	[1a.]
	" Nagri	...	0	1	8	[1a.]
Act X of 1904 (Co-operative Credit Societies)	In Urdu	...	0	1	0	[1a.]
	" Nagri	...	0	1	0	[1a.]
Act XI of 1904 (to revive and continue section 8B of the Indian Tariff Act, 1894)	In Urdu	...	0	0	8	[1a.]
	" Nagri	...	0	0	8	[1a.]
Act XII of 1904 (Emigration)	In Urdu	...	0	0	8	[1a.]
	" Nagri	...	0	0	8	[1a.]
Act XIII of 1904 (Indian Articles of War)	In Urdu	...	0	0	3	[1a.]
	" Nagri	...	0	0	8	[1a.]
Act XV of 1904 [Indian Stamp (Amendment)]	In Urdu	...	0	0	3	[1a.]
	" Nagri	...	0	0	3	[1a.]
Act I of 1905 [Local Authorities Loan (Amendment)]	In Urdu	...	0	0	3	[1a.]
	" Nagri	...	0	0	3	[1a.]
Act II of 1905 [Indian Universities (Validation)]	In Urdu	...	0	0	3	[1a.]
	" Nagri	...	0	0	3	[1a.]
Act III of 1905 (Indian Paper Currency) ...	In Urdu	...	0	0	9	[1a.]
	" Nagri	...	0	0	9	[1a.]
Act IV of 1905 (Indian Railway Board) ...	In Urdu	...	0	0	3	[1a.]
Act VI of 1905 (Court-fees Amendment) ...	In Urdu	...	0	1	6	[1a.]
	" Nagri	...	0	0	3	[1a.]
Act VII of 1905 (Bengal and Assam Laws)	In Urdu	...	0	0	3	[1a.]
	" Nagri	...	0	0	3	[1a.]
Regulation I of 1890 (British Baluchistan Laws)	In Urdu	...		——		[1a. 6p.]
Regulation V of 1890 (British Baluchistan Forests)	In Urdu	...	0	2	0	[1a. 6p.]
Regulation VI of 1893 (Hazara Forests) ...	In Urdu	...	0	2	0	[1a. 6p.]
Regulation VIII of 1896 (British Baluchistan Criminal Justice) ...	In Urdu	...	0	0	9	[1a.]
Regulation IX of 1896 (British Baluchistan Civil Justice)	In Urdu	...	0	3	3	[1a.]
Regulation III of 1901 (Frontier Crimes) ...	In Urdu	...	0	2	6	[1a.]
Regulation IV of 1901 (Frontier Murderous Outrages)	In Urdu	...	0	0	6	[1a.]
Regulation VII of 1901 (North-West Frontier Province)	In Urdu	...	0	4	0	[1a.]



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remaining two-thirds share was managed by Shiva, defendant No. 1, son of Nitai as *karta* of the joint family; and that plaintiff No. 1 was the grandson of Arjuna, and as such was entitled to an eight-anna share of the properties held by Shiva.

The defendants pleaded that Paramananda had only one son, Nitai; that he was not joint with Arjuna or the plaintiffs; and, so far as certain portion of the properties was concerned, that the suit was barred by *res judicata*.

It appeared that a few years ago when plaintiffs sold some of their lands to one Gobind Mungraj, defendant No. 1, Shiva brought a suit in the Court of the Munsif at Kendrapara against the vendor and vendee to set aside the *kobala* and recover posession of the conveyed properties. In that suit one of the issues was, whether the present plaintiffs had any right of interest in the land claimed. The Munsif of Kendrapara found that the plaintiffs had no right of interest in the lands claimed, and also found that no relationship existed between the plaintiffs and the first defendant in the suit. The said decision was confirmed, on appeal, by the High Court. It was contended that the aforesaid judgment of the Munsif of Kendrapara operated as *res judicata*.

The Court of first instance overruled the objection of the defendants, and decreed the plaintiffs' suit. On appeal, the learned District Judge, having held that the judgment of the Munsif of Kendrapara would not operate as *res judicata* in the present suit as the Munsif had no jurisdiction to try the present suit, affirmed the decision of the first Court. Against this decision the defendants appealed to the High Court.

Babu Shib Chandra Palit (*Babu Nilmadhub Bose* and *Babu Ram Chandra Mozumdar* with him), for the appellants. The present suit is barred by the provisions of section 13 of the Code of Civil Procedure, or at least it is so with respect to that portion of the claim which was the subject-matter of the previous litigation: *see Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahanee*(1) and *Bhagwanbutti Chowdhrani* v. *A. H. Forbes*(2). The latter case has been approved of in the case of *Ramgopal Mazumdar* v.

(1) (...80) I. L. R. 5 Calc. 832.

(2) (1900) I. L. R. 28 Calc. 78.

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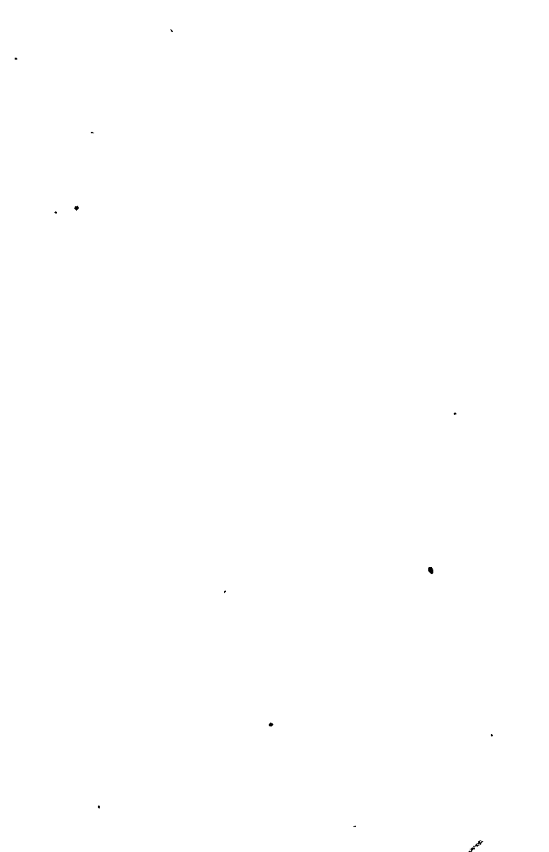
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(1) [illegible]80) I. L. R. 5 Calc. 832. (2) (1900) I. L. R. 28 Calc. 78.



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STEPHEN J.

record, and boundaries are given therein which might show that such lands are part of those now sued for. They appear only to be a part because the present suit is not within the jurisdiction of a Munsif, and it is not suggested that they are more than a part.

The question before us, therefore, resolves itself into two parts: *first*, can the present suit be entertained as to so much of the land in suit as was the subject matter of the suit in the Munsif's Court? *Secondly*, can the issue whether the plaintiff is related to the defendant, as alleged, be tried in the present suit after having been decided before the Munsif? The answer of course depends primarily on section 13 of the Civil Procedure Code which runs so far as it is material as follows:—"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties . . . . . litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally determined by such Court." Taking the second point first, the truth of the genealogy was an issue before the Munsif and is an issue here: and it follows from the judgment of Banerji, J. in *Rai Charan Ghose* v. *Kumud Mohun Dutt Chowdhry*(1), based on the cases there referred to and followed in *Ram Gopal Mazumdar* v. *Prasunna Kumar Sanial*(2), that what we have to consider is the competency of the Munsif to try the present suit, not that of the High Court by whom his decision was affirmed on appeal. This concludes the question as the present suit is beyond the Munsif's jurisdiction. The case of *Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahanee*(3) is referred to by the lower Appellate Court but has not been relied on by the appellants here; as it was decided on the Code repealed by the present Civil Procedure Code which alters the law on the subject.

On the first point we are invited to follow the decision on *Bhugwanbutti Chowdhrani* v. *A. H. Forbes*(4) followed in the second case above mentioned. That case is, however, distinguishable from the present in an essential feature. There the plaintiff

(1) (1898) I. L. R. 25 Calc. 571, 576. (3) (1880) I. L. R. 5 Calc. 832.
(2) (1905) 10 C. W. N. 529. (4) (1900) I. L. R. 28 Calc. 78.

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portion of the disputed property which formed the subject-matter of the litigation of 1899 can, in no view of the matter, be reopened for a fresh adjudication.

In support of the first branch of this argument, reliance is placed upon the decision of this Court in the case of *Toponidhee* v. *Sreeputty*(1). It is clear, however, that although that decision has never been formally dissented from, the rule laid down therein can no longer be regarded as good law. That case turned upon the construction of section 13 of Act X of 1877, the language of which was materially different from the language of section 13 of Act XIV of 1882. In the present Code, the words "competent to try such subsequent suit or the suit in which such issue has been subsequently raised" were expressly added so as to make it quite clear that the competence required is in respect of the subsequent suit also. This view is amply supported by the decision of their Lordships of the Judicial Committee in *Misir Raghobardial* v. *Sheo Baksh Singh*(2) and *Run Bahadur Singh* v. *Lucho Koer*(3). Under the present Code, in order to establish the plea of *res judicata* in a case of the description now before us, it has to be shown that the Court of concurrent jurisdiction, which decided the former suit, was a Court of jurisdiction competent to try the subsequent suit: *Ramdayal* v. *Junkidas*(4) and *Pangi* v. *Unni Kutti*(5). It follows, therefore, that the first branch of the contention of the appellants cannot be sustained.

The second branch of the contention of the appellants is that the suit is barred by *res judicata*, at least with respect to that portion of the disputed property which is alleged to have been the subject-matter of the previous litigation. In support of this proposition reliance is placed upon the cases of *Bhugwanbutti Chowdhrani* v. *A. H. Forbes*(6) and *Ramgopal Mazumdar* v. *Prasanna Kumar Sanial*(7). The decision of the question raised, however, must depend primarily upon the language of the Code, which seems to me to make it reasonably plain that in order to

(1) (1880) I. L. R. 5 Calc. 832.
(2) (1882) I. L. R. 9 Calc. 439; L. R. 9 I. A. 197.
(3) (1884) I. L. R. 11 Calc. 301; L. R. 12 I. A. 23.
(4) (1900) I. L. R. 24 Bom. 456.
(5) (1900) I. L. R. 24 Mad. 275.
(6) (1900) I. L. R. 28 Calc. 78.
(7) (1905) 10 C. W. N. 529.

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A. H. Forbes(1). It may be a matter of controversy, whether some of the observations, at any rate, in the decision relied upon may not be difficult to reconcile with the provisions of section 13 of the Code as interpreted in the judgment of the Judicial Committee to which reference has been made. This much is clear, however, that the decision turned upon facts and circumstances which are essentially distinguishable from those of the case before us, for the reasons set forth in the judgment of my learned brother.

Reliance was also placed upon the decision of the learned Judges of the Madras High Court in *Pathuma* v. *Salimamma*(2), with reference to which it is only necessary to observe that although it was decided after the present Code had come into force, some of the observations, at any rate, appear to be based upon the law as it was understood to be under the Code of 1877.

On these grounds, I must hold that the second branch of the contention of the appellants cannot be supported. The appeal consequently fails and must be dismissed with costs.

Appeal dismissed.

S. C. G.

(1) (1900) I. L. R. 28 Calc. 78.
(2) (1884) I. L. R. 8 Mad. 83.

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353, and Nos. 3 and 4 under s. 225 of the Indian Penal Code, and sentenced Nos. 1 and 2 to pay a fine of Rs. 50 each, and Nos. 3 and 4 a fine of Rs. 30 each.

The Magistrate made the following observation as to the legality of the arrest:—

"The offence of theft was continuing at the time when the stolen property was being removed. Under section 59, Criminal Procedure Code, even a private person had a right to arrest Radhanath who was then committing the theft. The custody in which Radhanath was detained was, therefore, certainly legal."

Babu D. N. Bagchi, for the petitioners. The offence of theft is not a continuing one. It was completed when the trees were cut and taken out of the garden, *i.e.*, out of the possession of the owner: compare *Nemai Chattoraj* v. *Queen-Empress*(1). The *duffadar* had no authority to arrest Radhanath when the theft was not committed in his presence: see s. 39, cl (2) of Act VI of 1870 (B. C.). Nor had he power to do so under s. 54 of the Criminal Procedure Code, since he is not a "police officer," nor under s. 59 of the Criminal Procedure Code, as a private person, too, could not make the arrest if the offence had not been committed "in his view." His custody, therefore, was not a "lawful custody" within the meaning of s. 225 of the Penal Code, nor was he in the "lawful discharge of his duty" within the meaning of s. 353: see *Kalai* v. *Kalu Chowkidar*(2), *Raman Singh* v. *Queen-Empress*(3).

No one appeared for the Crown.

RAMPINI AND SHARFUDDIN JJ. This is a Rule calling upon the District Magistrate of Burdwan to show cause why the conviction of, and sentences passed on, the petitioners should not be set aside.

The petitioner No. 1 has been convicted under sections 225 and $\frac{353}{114}$, the petitioner No. 2 under sections 225 and 353, and the petitioners Nos. 3 and 4 under section 225 of the Indian Penal Code. The petitioners, Nos. 1 and 2, have each been sentenced to pay a fine of Rs. 50, and each of the petitioners, Nos. 3 and 4, a fine of Rs. 30.

(1) (1900) I. L. R. 27 Calc. 1041. (2) (1900) I. L. R. 27 Calc. 366.
(3) (1900) I. L. R. 28 Calc. 411.



APPELLATE CIVIL.

Before Sir Francis W. Maclean K.C.I.E., Chief Justice, and Mr. Justice Coxe.

1908
Jan. 24.

JOGENDRA NATH SARKAR
v.
GOBINDA CHANDRA DUTT.*

Execution of decree—Shebaits—Claims to attached property by shebaits—Civil Procedure Code (Act XIV of 1882) ss. 244, 278.

Judgment-debtors, in their capacity as *shebaits*, can maintain an application under s. 244 of the Code of Civil Procedure and get an adjudication of the question raised by them.

Where judgment-debtors make applications both under s. 244 and s. 278, they do not lose any rights *qua* their application under s. 244 because of their mistake in applying under s. 278 of the Code of Civil Procedure.

Punchanun Bundopadhya v. *Rabia Bibi*(1) referred to.

SECOND APPEAL by the judgment-debtors, Jogendra Nath Sarkar and others.

One Ramani Dasi brought a suit for the entire arrears of rent of a *durputni taluq*, making Purna Chandra Chakravarti and others the principal defendants and her co-sharer Gobinda Chandra Datta, the present respondent, the *pro forma* defendant. Subsequently Gobinda was made a co-plaintiff in the former suit with his consent and the present applicants, Jogendra Nath Sarkar and his brothers, were made defendants on their own application, on their representation that their father was the purchaser of the tenure from the old proprietors, the Chakravartis. The suit was decreed against Jogendra and his brothers only for the entire rent, with a declaration that half of the rents was due to Ramani and another half to Gobinda, the present respondent. Ramani alone executed the decree. The *durputni* in arrears was attached and proclaimed for sale. After several postponements, at the instance

* Appeal from Appellate Order, No. 275 of 1907, against the order of F. Roe, District Judge of Hooghly, dated April 17, 1907, affirming the decree of Sripati Chatterjee, Subordinate Judge of Hooghly, dated Feb. 13, 1907.

(1) (1890) I. L. R. 17 Calc. 711.

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JOGENDRA NATH SARKAR v. GOBINDA CHANDRA DUTT.

Mahapatra v. *Mohunt Padma Charan*(1) was a similar case, and the judgment of Maclean C. J. who heard the case on a difference of opinion of Rampini and Gupta JJ. is clear and conclusive and in my favour. The judgment in *Amar Chand Kundu* v. *Nani Gopal Mukerjee*(2) also holds that a separate suit does lie. The Madras and Bombay High Courts also hold this view: see *Murigeya* v. *Hayat Saheb*(3) and *Ramanathan Chettiar* v. *Levvai Marakayar*(4).

MACLEAN C.J. It is not very easy from the terms of the judgment of the District Judge to ascertain what the appeal is about. But from the terms of the grounds of appeal and the arguments addressed to us the question appears to be whether the appellants could properly raise the question they desired to raise, on an application under section 244 of the Code of Civil Procedure. It appears that a decree in the suit was passed against them personally: that in execution of that decree attachment was issued, or was about to be issued, against certain property: the appellants say that property does not belong to them personally, but that it belongs to them as *shebaits* of an Idol: that, as such, it is not liable to attachment, and they contend that this question is properly triable under section 244. They made two applications—one under section 244 and the other under section 278. There appears to be some inconsistency in making these two applications. Both have been dismissed. So far as the order was made under section 278, admittedly there is no appeal: but they say that, so far as it was an application under section 244 there is an appeal. This is what we have to decide, and the question is whether the question could be determined under section 244. As the appellants were parties to the suit, we think the case fell within section 244. There has been some difference of judicial opinion upon the point, but we need not go through the cases as the question seems to be concluded in principle by the Full Bench decision of this Court, in the case of *Punchanun Bundopadhya* v. *Rabia Bibi*(5).

(1) (1902) 6 C. W. N. 663.
(2) (1907) 12 C. W. N. 308.
(3) (1898) I. L. R. 23 Bom. 237.
(4) (1899) I. L. R. 23 Mad. 195.
(5) (1890) I. L. R. 17 Calc. 711.



APPELLATE CRIMINAL.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

1908
Jan. 13.

KABIRUDDIN
v.
EMPEROR.*

Private defence, right of—Rioting—Assembly of armed men prepared for fight—Penal Code (Act XLV of 1860) ss. 96 to 106—Misdirection to Jury.

There is no right of private defence where two parties arm themselves for a fight to enforce their right or supposed right, and deliberately engage in large numbers in a fight. In such a case, if it is not shown that the accused were acting within the legal limits of the right of private defence, it does not matter which party was the first to attack.

In re Kalee Beparee(1) and *Jairam Mahton* v. *Emperor*(2) followed.

The appellants were tried before the Sessions Judge of Patna and a Jury who unanimously found them guilty under ss. 147 and 148 of the Penal Code. They were sentenced to terms of imprisonment varying from one to two years. It appeared that on the morning of 10th March 1907 a large body of men, about 500 in number, belonging to a village called Chero went armed with *lathis* and swords to the Pathari *pyne* to throw up an *alung* taking earth from the dry channel for the purpose. While so engaged the opposite party from the village of Iswa, numbering 300 or 400, came up similarly armed, and a free fight ensued in the course of which one man was killed and several others wounded.

Mr. Norton (*Babu Manmatha Nath Mookerjee* with him), for the appellants. The charge of the learned Sessions Judge contains flagrant misdirections. He has expressly told the jury (i) that in his view of the law no right of private defence exists, (ii) that it is unnecessary for them to decide which party was in *de facto*

* Criminal Appeal No. 904 of 1907, against the order of H. W. C. Carnduff Sessions Judge of Patna, dated Sept. 30, 1907.

(1) (1878) 1 C. L. R. 521. (2) (1907) I. L. R. 35 Calc. 103.

APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Mookerjee.

SHIBO RAUT

v.

BABAN RAUT.*

1908
Jan. 14.

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Competency of Court to try the previous and the subsequent suit—Concurrent jurisdiction.

Under the present Code of Civil Procedure, in order to establish the plea of *res-judicata*, it has to be shown that the Court of concurrent jurisdiction which decided the former suit was a Court of jurisdiction competent to try the subsequent suit.

Toponidhee Dhirj Gir Gosain v. *Sreeputty Sahanee*(1) distinguished.

B sold a certain property to *C*; *A* brought a suit against *B*, *C* and others, in the Court of the Munsif, for recovery of possession of property so conveyed, and to have the *kobala* granted by *B* to his vendee set aside; the suit was decreed in favour of *A* on the ground that *B* had no share in the disputed land and that no relationship existed between *A* and *B*

In a subsequent suit brought by *B* in the Court of the Subordinate Judge, for a declaration of his title to an eight-annas share in a certain property, a portion of which was covered by the aforesaid *kobala*, and for joint possession thereof with *A*, defence was that the suit was barred by *res judicata*, or at least it was so with respect to that portion of the disputed property, which was the subject-matter of the previous litigation:—

Held, that the suit was not so barred.

Bhugwanbutti Chowdhrani v. *A. H. Forbes*(2) distinguished.

SECOND APPEAL by the defendants, Shibo Raut and others

This appeal arose out of an action brought by the plaintiffs for declaration of their title to a certain property and for joint possession thereof. The allegation of the plaintiffs was that the lands in suit formed part of the ancestral holding of one Paramananda Raut, who left three sons, Nitai, Hari and Arjuna; that Hari separated from the rest of the family, and the

* Appeal from Appellate Decree, No. 263 of 1906, against the decree of J. J. Platel, Offg. District Judge of Cuttack, dated Jan. 4, 1906, confirming the decree of Bidhu Bhusan Chakravarti, Subordinate Judge of Cuttack, dated Feb. 21, 1905.

(1) (1880) I. L. R. 5 Calc. 832.

(2) (1900) I. L. R. 28 Calc. 78.

1910

KABIRUDDIN

v.

EMPEROR.

The evidence shows that the *thana* was only a short distance away, but the parties not only did not go there but actually fought in the presence of the police. There is no right of private defence on the facts of the case: *see* s. 99, cl. (3) of the Penal Code.

RAMPINI J. This is an appeal by twelve persons who have been convicted by the Sessions Judge of Patna of offences under sections 147 and 148 of the Penal Code, and sentenced to terms of imprisonment varying from one to two years. The trial was held with the assistance of a Jury who unanimously found the accused guilty. The verdict of a Jury can only be set aside on the ground of misdirection in the charge by the Judge to the Jury which "has in fact occasioned a failure of justice." The alleged facts of this case are set out by the Judge as follows:—"On the morning of the 10th March Fakira Dhari, one of the chaukidars of Iswa, saw a mob collected on the Pathari *pyne*, and learnt that they were Chero people come to throw up an *alung* on the western side, taking earth from the then dry channel in order to do so; also that the Iswa people intended to contest the other's right to do anything of the kind. He at once went to the Surmera outpost and gave information to the writer-constable who was there alone, and could do no more than record a *sancha* on hearing what he and another chaukidar, Budhna, who had come almost simultaneously with similar information, had to say. Budhna was sent off to Sheikhpura in Monghyr to give formal information to the head-constable, Nurul Nabi, who had gone there to attend a police co-operation meeting, while two constables, Rajkumar and Surajnath, were deputed to accompany Fakira back to the *pyne* and avert a riot, if possible. On reaching the place they found some 500 Chero people armed with *lathis* and swords, among them being about 200 labourers, excavating the earth, and, most prominent of all, Kabiruddin directing operations, from horseback eventually, but himself unarmed. At the same time a slightly smaller *gahar*, 300 or 400 are the figures suggested, was seen coming from the Iswa side led by Sahdeo Singh of Iswa, also on horseback, armed and shouting '*Jai Mahabir*.' The police implored the Chero people first and then the Iswa people,

Prasunna Kumar Sanial(1). The case of *Pathuma* v. *Salimamma* (2) also supports my contention.

Babu Girish Chandra Paul (*Babu Lal Mohan Das* with him), for the respondents. The issue in the former suit was different, and hence the principle of *res judicata* is not applicable. The Munsif who tried the former suit had no jurisdiction to try the present suit.

Babu Shib Chandra Palit, in reply.

Cur. adv. vult.

STEPHEN J. In this case the plaintiff sues for a declaration of his title to an 8 annas share in certain property, for joint possession thereof with the principal defendants and for mesne profits. In the lower Court the case was contested chiefly on questions of fact relating to the family genealogy and the history of the property in relation to the family of which all the parties were members, which were decided in the plaintiff's favour and with which we are not concerned A point of law was, however, raised on behalf of the defendant, which has been argued before us on a second appeal. This is that the suit is *res judicata*, and it arises as follows. Some years ago the plaintiff, sold certain lands to one Gobinda Charan Mungraj; and defendant No. 1 in the present suit, one of the appellants before us, sued in the Court of the Munsif of Kendrapara for recovery of possession of the property so conveyed, and to have the *kobala* granted by the present plaintiff to his vendee set aside. He succeeded in the former claim, judgment being given in his favour on the 14th August 1899, on the ground that the present plaintiff had no share in the disputed land, and that the relationship between the plaintiff and the first defendant, and consequently the other defendants, found as proved in the present case, did not exist. This decision was affirmed on appeal to this Court. There is no finding before us, as to the identity of the land affected by the Munsif's decree with that now in suit, or any part of it. The *kobala* granted by the plaintiff to Gobinda is, however, on the

(1) (1905) 10 C. W. N. 520. (2) (1884) I. L. R. 8 Mad. 83

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them with the so-called Pathari *pyne* has been established. Next, there are Treasury *chalans* showing that Musst. Fasiban, the Chero *malika*, has paid into the Treasury at Patna in the years 1884, 1889, 1892, 1894, 1896, 1897, and 1901 sums of money on account of '*bandheri*,' and the '*sakri band*.' And lastly, each side has produced *gilandazi* papers and evidence in support thereof, while the defence have called a *beldar* who swears that he had repaired the *pyne* at the expense and on behalf of Chero.

The task of deciding what, in the result, is established by this conflict of evidence, would, I think, be a difficult one, and, in the view I take of the law, it is not necessary for you to attempt any adjudication. In a word, I am clearly and strongly of opinion that, if the case of a free fight deliberately engaged in by the parties is true, it is wholly immaterial what their rights were or are. This brings me to an explanation of the law of rioting.

An assembly of five or more persons is an 'unlawful assembly' if the common object of the persons composing it is by means of criminal force or show of criminal force to any person to enforce any right or supposed right. And an assembly which was not unlawful when it assembled may become an unlawful assembly. Whoever intentionally uses force to any person without that person's consent in order to the committing of any offence, or intending by the use of such force to cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other. Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of its common object, every member of it is guilty of rioting under section 147 of the Indian Penal Code. And if any person so guilty is armed with a deadly weapon or anything, which, used as a weapon of offence, is likely to cause death, he is liable to severe punishment under section 148.

In order then to convict anyone of the accused under section 148 you must be satisfied (*i*) that he was one of five or more persons assembled with a common object, (*ii*) that the common object was forcibly to assert the supposed right of Chero to take earth from the Pathari *pyne*, (*iii*) that in prosecution of that common object force or violence was actually used, and (*iv*) that he was armed with a deadly weapon.

Prasunna Kumar Sanial(1). The case of *Pathuma* v. *Salumamma* (2) also supports my contention.

Babu Girish Chandra Paul (*Babu Lal Mohon Das* with him), for the respondents. The issue in the former suit was different, and hence the principle of *res judicata* is not applicable. The Munsif who tried the former suit had no jurisdiction to try the present suit.

Babu Shib Chandra Palit, in reply.

Cur. adv. vult.

STEPHEN J. In this case the plaintiff sues for a declaration of his title to an 8 annas share in certain property, for joint possession thereof with the principal defendants and for mesne profits. In the lower Court the case was contested chiefly on questions of fact relating to the family genealogy and the history of the property in relation to the family of which all the parties were members, which were decided in the plaintiff's favour and with which we are not concerned. A point of law was, however, raised on behalf of the defendant, which has been argued before us on a second appeal. This is that the suit is *res judicata*, and it arises as follows. Some years ago the plaintiff, sold certain lands to one Gobinda Charan Mungraj; and defendant No. 1 in the present suit, one of the appellants before us, sued in the Court of the Munsif of Kendrapara for recovery of possession of the property so conveyed, and to have the *kobala* granted by the present plaintiff to his vendee set aside. He succeeded in the former claim, judgment being given in his favour on the 14th August 1899, on the ground that the present plaintiff had no share in the disputed land, and that the relationship between the plaintiff and the first defendant, and consequently the other defendants, found as proved in the present case, did not exist. This decision was affirmed on appeal to this Court. There is no finding before us, as to the identity of the land affected by the Munsif's decree with that now in suit, or any part of it. The *kobala* granted by the plaintiff to Gobinda is, however, on the

(1) (1905) 10 C. W. N. 529. (2) (1884) I. L. R. 8 Mad. 83

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their supposed rights and engaged in a fight with men equally determined to vindicate them no question of private defence can arise. It comes to this simply, that our law does not permit rival claimants to enter in cold blood into battle to settle a dispute which can be settled in a lawful manner. Here you must remember that the occurrence took place on the 10th March, six months after the last rains had ceased and three months before the next rains were expected. There would, therefore, be no pressing necessity for the erection of an *alung*. On the contrary, not only was there plenty of time to seek the protection of the police at the outpost, a mile distant, but the police were on the spot, if you believe them, trying to prevent a breach of the peace. There was plenty of time to ask the Magistrate at Barh to issue an order under section 144 of the Code of Criminal Procedure so as to enable the Chero people to put up the *alung* before the rains; there was time indeed to bring a suit to establish the right. And what was there to prevent them waiting until the settlement officer arrived and went into the matter on the spot with a view to the record of rights contemplated? If you find that the accused well knew that the right was disputed and would be forcibly contested by Iswa, that they, nevertheless, went in anything like the numbers asserted to exercise the right in the teeth of opposition, that there was no necessity or justification in the patent facts for their taking the earth and throwing up the *alung* at the time in question, and that they joined battle in the face even of police remonstrance on the spot, then you should, without hesitation, convict all who participated of rioting."

Mr. Norton, for the appellants, contends that in this passage in the Judge's charge there is a flagrant misdirection on a point of law and that, therefore, the conviction of the appellants cannot stand. He urges that the Judge should not have told the Jury that when two bodies of armed men go out to fight a pitched battle, defying the representatives of the law that are present and urge them to desist from fighting, the questions of right and who are the aggressors are immaterial, but on the contrary that the Judge should have directed the Jury to find (i) who were in the possession of the *pyne* about which the fight took place, (ii) by what right they were in possession, and (iii)

sued before a Subordinate Judge for road and public work cesses, embankment cesses, *dak* cesses, and other matters designated as "etc.," claiming an amount which exceeded that for which he could sue before a Munsif. In a previous suit before a Munsif the defendant had sued for a refund of what he had paid for road and public-works cess, and the suit was decreed on the ground that the plaintiff was not liable to pay the cesses at the enhanced rate claimed. It was held that the plaintiff in the second suit could not join a cause of action on which he had been previously defeated, with new causes of action; and that such an action amounted to an evasion of section 13. In the present case it was not open to the plaintiff to divide his cause of action as he might have done in the former case By section 43 he was compelled "to include the whole of the claim which he was entitled to make in respect of the cause of action." The land he sued to recover was all held under one title according to his case. He might, it is true, have omitted the land which was the subject matter of the action before the Munsif, and it may be argued that this was not land he was entitled to make a claim in respect of. But this argument is not of sufficient force, to induce me to extend the principle of the decision to a case where the facts differ so essentially. The principle makes an apparent, though not a real, inroad on the meaning of section 13. To extend it as suggested to this case would in my opinion be making the inroad a real one. The appeal is accordingly dismissed with costs.

MOOKERJEE, J. The only substantial question of law which calls for decision in this appeal is, whether the suit is barred by the principle of *res judicata*. The Courts below have concurrently answered this question against the appellants.

It is argued before this Court that the suit is barred by *res judicata*, *first*, because the question of title to the disputed property which turns upon the relationship of the parties was directly and substantially in issue in the litigation of 1899 and was then decided in favour of the present appellants; and *secondly*, because the question of title in so far as it affects that

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variously interpreted in different sets of circumstances, remains the same, and we are bound to apply it to the circumstances of the present case according to our lights. I have no doubt that according to the Penal Code no right of private defence arises in circumstances such as those of the present case, when both parties armed themselves for a fight, to enforce their right or supposed right and deliberately engaged in very large numbers in a pitched battle, killing one man and wounding others In such a case, as said in the exactly similar case of *In re Kalee Byparee*(1), where both parties are armed and prepared for battle, and it is not shown that they were acting within the legal limits of the right of private defence, it does not matter which is the first to attack. In the present case the appellants, if they had any right of private defence, which in the circumstances in my opinion they had not, did not act within the legal limits of such right. They did not restrict themselves merely to the use of such force as was necessary to resist trespass. On the contrary, they far exceeded their right, if they had any, for they killed a man and inflicted serious injuries on others As has been said in the case of *Joiram Mahton* v. *Emperor*(2), "The right of private defence of property is a restricted right. Section 99 of the Indian Penal Code expressly lays down that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities, and it also lays down that the right of private defence in no case extends to doing more harm than is necessary for the purpose of defence. Sections 100 to 105 make the right depend on the circumstances of each case. No man has the right to take the law into his own hands for the protection of his person or property, if there is a reasonable opportunity of redress by recourse to the public authorities. Referring to *Hyde* v. *Graham*(3), Holloway J. in *Madras High Court Proceedings, 8th January 1873*(4) says:—'The natural tendency of the law of all civilized States is to restrict within constantly narrowing limits the right of self-help, and it is certain that no other principle can be safely applied to a country (like this). . . .' The right of self-help, when it causes or is likely to cause damage to the

(1) (1878) 1 C. L. R. 521.

(2) (1907) I. L. R. 35 Calc. 103.

(3) (1862) 1 H. & C. 593.

(4) (1873) 7 Mad. H. C. Ap. xxv.

establish the plea of *res judicata* the Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the subsequent suit but also the subsequent suit itself in which the issue is subsequently raised. In support of this proposition it is sufficient to refer to the decision of their Lordships of the Judicial Committee in *Gokul Mandar* v. *Pudmanund Singh*(1) in which Lord Davey pointed out that section 13 of the present Code, which embodies the principle just enunciated, goes in this respect beyond section 13 of the previous Code (Act X of 1877) and also beyond the law laid down by the Judges in the *Duchess of Kingston's case*(2). Lord Davey further observed that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction. If the principle thus interpreted by the Judicial Committee is applied to the case before us, there can be no possible controversy that the plea of *res judicata* cannot be sustained.

It was faintly suggested, however, on behalf of the appellants that as in the previous litigation the decision of the Court of first instance was subsequently affirmed by this Court, and as in the present litigation also the matter has been carried before this Court, the plea of *res judicata* ought to be allowed, or in other words, that the true criterion is the competency of the Court of appeal to decide the question. In my opinion this contention is not well founded It is now firmly settled that it is the competency of the original Court which decided the former suit that must be looked to and not that of the appellate Court in which the suit was ultimately decided on appeal: *Bharasi Lal Chowdhry* v. *Sarat Chunder Dass*(3), *Koylash Chandra De* v. *Tarak Nath Mandal*(4) and *Ram Gopal Mazumdar* v. *Prasunna Kumar Sanial*(5).

It was argued further that the view we take is inconsistent with the decision of this Court in *Bhugwanbutti Chowdhrani* v.

(1) (1902) I. L. R. 29 Calc. 707.
(2) (1776) Smith's L. C., Vol. 2, 731.
(3) (1895) I. L. R. 23 Calc. 415.
(4) (1897) I. L. R. 25 Calc. 571, 576.
(5) (1906) 10 C. W. N. 529.

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Sharfuddin J.

unless it be shown that the accused were acting in the exercise of their right of private defence."

Mr. Norton, counsel for the appellants, contends that the above amounts to a misdirection, inasmuch as the learned Sessions Judge was bound to place before the Jury the evidence as to possession; and that this omission has caused a miscarriage of justice, for if the Jury had found possession of his clients, even for a few hours before the occurrence, they had a right to defend their possession against any aggression by the other side.

The Indian Penal Code deals with the right of private defence in sections 96 to 106. Under section 97 "every person has a right, subject to the restrictions contained in section 99, to defend his property or that of any other person against any act which is an offence falling under the definition of offences mentioned in that section." One of the restrictions under section 99 is that "there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities." By the above restriction an accused cannot set up this right with regard to property in his possession if he has time to invoke the protection of the authorities. In cases of sudden fights, where there has not been any preparation by either side, a man, no doubt, is within the law, if in defending his property he causes such bodily injuries to the aggressive party as are allowed by the sections of the Penal Code which deal with the right of private defence.

If the facts of the present case disclose a state of things which clearly goes to show that the accused had full knowledge of the fact that they would be opposed by the other side, their duty, as required by law, would be to have recourse to the protection of the authorities, provided there was time enough to do so. If there was time, they had no right to go to the scene of occurrence and thus invite the other side to come and attack them. The occurrence is said to have taken place on the 10th March 1907, when the Pathari *pyne* was quite dry. The accused had gone to the place to repair the embankment of the said *pyne* which embankment is situated on the Chero side of the *pyne*. Chero is the village to which the accused belong. The opposing party belong to the village Iswa. On the date of the occurrence there

CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

1907
Dec. 13.

BOLAI DE
v.
EMPEROR.*

Rescue from lawful custody—Assault to deter public servant from discharge of duty—Arrest by duffadar for theft not committed in his presence—Theft whether a continuing offence—Penal Code (Act XLV of 1860) ss 225, 353 and 379—Village Chaukidari Act (Beng. VI of 1870) s 39, cl. (2)

The arrest by a *duffadar* of a person for theft on complaint made to him, but not committed in his presence, is illegal under s 39(2) of Bengal Act VI of 1870; and neither the rescue of such person from his custody nor the threat to beat him does amount to any offence under s. 225 or s. 353 of the Penal Code.

The offence of theft is not a "continuing" one.

ONE Jadu Bagdi, on seeing one Radhanath Dey cutting and removing some plantain trees from his garden and placing them on a cart waiting outside, cried out that his plantain trees were being stolen away. The *duffadar* on hearing the cry ran to the spot and saw a cart loaded with five or six freshly-cut plantain trees being driven away by Radhanath along the road next to the garden, and being followed by Jadu who told him that the trees had been cut from his garden by Radhanath. The *duffadar* seized the latter and proceeded with him and the cart-load of plantain trees a short distance towards the thana, when the petitioners came up and rescued Radhanath with the cart and the plantain trees from his hands. The petitioner, Bolai, ordered the *duffadar* to be beaten, and the petitioner, Gokul, raised his *lathi* to strike him, but the blow was averted by one Sital who happened to be then present.

The petitioners were put on their trial before Babu Ashutosh Bagchi, the Sub-divisional Magistrate of Kalna, and were convicted, No. 1 under ss. 225 and $\frac{353}{114}$, No. 2 under ss. 225 and

* Criminal Revision No. 1256 of 1907, against the order of Ashutosh Bagchi, Deputy Magistrate of Kalna, dated June 4, 1907.

1908

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SHARFUDDIN J.

unless it be shown that the accused were acting in the exercise of their right of private defence."

Mr. Norton, counsel for the appellants, contends that the above amounts to a misdirection, inasmuch as the learned Sessions Judge was bound to place before the Jury the evidence as to possession; and that this omission has caused a miscarriage of justice, for if the Jury had found possession of his clients, even for a few hours before the occurrence, they had a right to defend their possession against any aggression by the other side.

The Indian Penal Code deals with the right of private defence in sections 96 to 106. Under section 97 "every person has a right, subject to the restrictions contained in section 99, to defend his property or that of any other person against any act which is an offence falling under the definition of offences mentioned in that section." One of the restrictions under section 99 is that "there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities." By the above restriction an accused cannot set up this right with regard to property in his possession if he has time to invoke the protection of the authorities. In cases of sudden fights, where there has not been any preparation by either side, a man, no doubt, is within the law, if in defending his property he causes such bodily injuries to the aggressive party as are allowed by the sections of the Penal Code which deal with the right of private defence.

If the facts of the present case disclose a state of things which clearly goes to show that the accused had full knowledge of the fact that they would be opposed by the other side, their duty, as required by law, would be to have recourse to the protection of the authorities, provided there was time enough to do so. If there was time, they had no right to go to the scene of occurrence and thus invite the other side to come and attack them. The occurrence is said to have taken place on the 10th March 1907, when the Pathari *pyne* was quite dry. The accused had gone to the place to repair the embankment of the said *pyne* which embankment is situated on the Chero side of the *pyne*. Chero is the village to which the accused belong. The opposing party belong to the village Iswa. On the date of the occurrence there

The learned pleader, who appears on their behalf, states that his clients have committed no offence, because the persons whom they rescued had not been legally arrested by the *duffadar* who was the complainant in this case. The *duffadar* appears to have arrested one Radhanath Dey against whom a complaint of theft had been made by one Jadu Bagdi. But he was apparently not justified in arresting Radhanath Dey, because under section 39, clause (2) of Act VI of 1870 (B.C.) he was only entitled to arrest a person for theft committed in his presence. It is clear that the theft in the present case had been completed before he came up, and the offence is not a continuing one, as contended by the Deputy Magistrate. Therefore, the *duffadar* had no right to arrest Radhanath Dey In these circumstances, he was not engaged in the *lawful* execution of his duty when the petitioners came and rescued Radhanath Dey and threatened to beat the complainant.

We, therefore, set aside the convictions and sentences and direct that the fines, if paid, be refunded. The Rule is thus made absolute.

Rule absolute.

E. H. M.

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SHARFUDDIN J.

The common object mentioned in the charge is to support a supposed right to take earth from the Pathari *pyne*. The question, therefore, is as to whether the Chero people had gone to the spot to defend a right or to assert it. It is clear that they had gone to assert that right, or otherwise there would have been no necessity of going to the place in such a large body and so armed. It is contended on behalf of the appellants that they, having arrived on the spot first, had the right to remain there, and if disturbed in that right they were entitled to set up the plea of the right of private defence. I cannot accept the above proposition, as such an enunciation of law would be dangerous to the peace of the country. It would justify a regular race between two factions as to who should arrive first.

In the above circumstances, I am of opinion that the learned Sessions Judge was right in telling the jury that if they found (*a*) that there had been a premeditated fight between the parties, (*b*) that the remonstrances of the two constables were ineffectual, (*c*) that there was no pressing necessity to repair the *pyne*, and (*d*) that there was ample time to seek the protection of the authorities, it was immaterial as to which of the parties was in possession.

One of the common objects mentioned in section 141 of the Indian Penal Code is—"by means of criminal force or show of criminal force to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of the right of way or of the use of water or other incorporeal right of which he is in possession or enjoyment, or *to enforce any right or supposed right*." The expression "to enforce any right or supposed right" suggests an opposing party, and hence I find that the accused have been charged with rioting with the common object, *to wit*, to assert by force or show of force a supposed right.

Our attention has been drawn by the counsel on both sides to various authorities in support of their respective contentions. They have been referred to by my learned brother in his judgment and I need not discuss them.

For the above reasons I concur with my learned brother and dismiss this appeal.

Appeal dismissed.

R. H. M.

1903

JOGENDRA NATH SARKAR v. GOBINDA CHANDRA DUTT.

of the judgment-debtors, the *durputni* was sold. The sale was set aside under s. 310A of the Code of Civil Procedure by satisfaction of Ramani Dasi's claims for herself. On Gobinda Chandra attempting to recover his dues under the very same decree by attachment and sale of the *durputni taluq*, the debtors raised the objection that the property did not belong to them personally but as *shebaits*, and that, as such, it was not liable to attachment. So they put two applications—one under s. 244 of the Civil Procedure Code in their capacity of judgment-debtors in the decree, and another under s. 278 as *shebaits*.

The Subordinate Judge rejected both the applications being of opinion that the judgment-debtors had no right to maintain their objection under s. 244 of the Code, both on the merits of the case and in law and that, after they had allowed themselves to be made parties to the suit in their personal capacity, they could not claim on behalf of the Thakur, and lastly that as the decree was a rent decree, an application under s. 278 of the Code did not lie.

On appeal to the District Judge, he dismissed the appeal holding that the judgment-debtors were not at liberty in their personal capacity to say that the property was *debutter* property, and that the decree was a money-decree.

Babu Mahendranath Roy (*Babu Krishnaprasad Sarbadhikari* with him), for the appellants. The Full Bench case of *Punchanun Bundopadhya* v. *Rabia Bibi*(1) and *Beg Raj Marwari* v. *Kundali Debya*(2) are in my favour in principle. *Ramanathan Chettiar* v. *Levvai Marakayar* (3) and *Ramkrishna Mahapatra* v. *Mohunt Padma Charan Deb Goswami*(4) are against the views of the Calcutta Full Bench case.

Babu Brajalal Chakravarti, for the respondents. *Punchanun Bundopadhya* v. *Rabia Bibi*(1) and *Beg Raj Marwari* v. *Kundali Debya*(2) are distinguishable. In the former, the claim was by the judgment-debtor of the attached property as his own. In the latter case also the claim was similar. *Bhyahari Pal* v. *Ramlal Das*(5) is directly in point and in my favour. *Ramkrishna*

(1) (1890) I. L. R. 17 Calc. 711.
(2) (1902) 8 C. W. N. 353.
(3) (1899) I. L. R. 23 Mad. 195.
(4) (1902) 6 C. W. N. 622.
(5) (1901) 6 C. W. N. 63.

1903

BOMWETSCH v. BOMWETSCH.

children. The only point the Court will consider is—what will be best for the benefit of the child? The mother is an unfit and improper person to have custody of the infant, and the father is financially in a better position: see *Witt* v. *Witt*(1) and *Barnardo* v. *McHugh*(2).

[*Fletcher* J. referred to *Gordon* v. *Gordon*(3).]

Mr. Godfrey (*Mr. Gregory* with him), for the petitioner. Inasmuch as the marriage was declared null and void *ab initio*, the child must be considered in law illegitimate. It follows that the natural right to the custody of the infant lies with the mother: *Barnardo* v. *McHugh*(2) and *In re Darcys*(4).

Mr. Mehta, in reply.

FLETCHER J. This is an application made by the respondent, in a suit brought in this Court for nullity of marriage to have the custody of the child of the petitioner. A decree for nullity was made in May last year on the petition of the petitioner on the ground that the petitioner was the sister of the deceased wife of the respondent.

A reference was directed in chambers to the Registrar to enquire and report what would be a fit and proper amount to be allowed for the maintenance of the child of the petitioner, and the Registrar reported that Rs. 75 a month during the hot weather and Rs. 50 a month during the cold weather would be a proper allowance for the maintenance of the infant, and the petitioner was given the custody of the infant.

The respondent now applies to vary that order on the ground that the petitioner is not a fit and proper person to have the custody of the child. It is to be noticed in the first instance that this is not a case in which the Court made a declaration of nullity of a marriage which was voidable The marriage in the present case is one which was void *ab initio*.

The child in law is the illegitimate child of the petitioner and she is entitled, unless a strong case is made out to the contrary, to the custody of the child.

(1) [1891] P. 163.
(2) [1891] A. C. 388, 395, 399.
(3) [1903] P. 92
(4) (1860) 11 Ir. C. L. 298.

1908

JOGENDRA NATH SARKAR v. GOBINDA CHANDRA DUTT.

I do not consider that the appellants have lost any rights *qua* their application under section 244 because they made a mistake in applying under section 278.

The appeal must be allowed with costs, and the case must go back to be tried on its merits. I have assumed throughout that the appellants are the only *shebaits*.

COXE J. I agree.

Appeal allowed.

S. M.

CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

MANIRUDDIN

v.

EMPEROR.*

1908
Feb. 18.

Private defence, right of—Common object, as found by Trying and Appellate Courts—Penal Code (Act XLV of 1860) ss. 96—106.

No right of private defence arises where a large body of men go armed and prepared for a fight, and attack the opposite party with intent to enforce their right or supposed right to certain land.

The petitioners numbering from forty to sixty, armed with *lathis*, spears and heavy billets of wood, proceeded to the disputed land, attacked the complainant and his father, and destroyed the crops growing thereon. Both parties claimed the land as having fallen to their shares on partition. The Magistrate found that the complainant was in possession and had grown the crops :—

Held, that the right of private defence did not arise, as there was no invasion of the petitioner's rights on the day of occurrence, and, in any case, that they had ample time to have recourse to the authorities for the protection of their rights.

Where the accused were charged with rioting with intent to dispossess the complainant, but the Appellate Court thought the question of possession not clear and found them guilty of rioting with the intention of enforcing their right or supposed right :—

Held, that both common objects raised the same questions, and that the accused were in no way prejudiced.

THE petitioners, Maniruddin and others, were tried by the Sub-divisional Officer of Habiganj and convicted under s. 148 of the Penal Code. On the 8th March 1907 the accused, from forty to sixty in number, went armed with *lathis*, spears and heavy billets of wood and attacked the complainant, Basir Mahomed, and his father, and destroyed their crops on a certain piece of land.

The complainant claimed the disputed land as having fallen, on partition, to the share of his landlord, while the petitioners alleged that it had fallen to their share. The Magistrate found that the complainant was in possession and had grown the crops,

* Criminal Revision No. 15 of 1908, against the order of J. Phillimore, Sessions Judge of Sylhet, dated Nov. 18, 1907.

possession, and which party was the aggressor. He has also cast the *onus* of proof upon the accused as regards the plea of self-defence. There is express authority for the proposition that a private individual has the right to oppose force to force if his possession of property is endangered by the wrongful act of another: *Queen* v. *Sohun*(1), *Queen* v. *Mitto Singh*(2), *Queen* v. *Sachee*(3), *Birjoo Singh* v. *Khub Lall*(4), *Shunker Singh* v. *Burmah Mahto*(5), *Ganouri Lal Das* v. *Queen-Empress*(6), *Moher Sheikh* v. *Queen-Empress*(7), *Pachkauri* v. *Queen-Empress*(8), *Anant Pandit* v. *Madhusudan Mandal*(9), *Poresh Nath Sircar* v. *Emperor*(10), *Bepin Behari Guha* v. *Pran Kul Majumdar*(11), *Queen-Empress* v. *Narsang Pathabhai*(12), *Queen Empress* v. *Peehmuthu Teran*(13). These cases show that the main question for decision is who is in possession, and the learned Judge has in express words taken away from the Jury the decision of this point. If your Lordships differ from the rulings cited by me the case should be referred to a Full Bench.

Mr. P. L. Roy (*Babu Joygopal Ghose* with him), for the Crown There is no error in the direction of the learned Judge that if the Jury were of opinion that both parties went prepared for a fight there would be no right of private defence. There is ample authority in support of this view: *Queen* v. *Nowabdee*(14), *Queen* v. *Jeolall*(15), *Queen* v. *Mana Singh*(16), *In re Kalee Beparee*(17), *Queen-Empress* v. *Prag Dat*(18), *King-Emperor* v. *Kalju*(19), *Emperor* v. *Kadhu Singh*(20) and *Jairam Mahton* v. *Emperor*(21). The case has been tried by a Jury and their verdict cannot be set aside even on the ground of misdirection unless it has occasioned a failure of justice: *see* s. 537 of the Criminal Procedure Code.

(1) (1865) 3 W. R. Cr. 59.
(2) (1865) 3 W. R. Cr. 41
(3) (1867) 7 W. R. Cr. 112
(4) (1873) 19 W. R. Cr. 66.
(5) (1875) 23 W. R. Cr. 25.
(6) (1889) I. L. R. 16 Calc. 206
(7) (1893) I. L. R. 21 Calc. 392
(8) (1897) I. L. R. 24 Calc. 686.
(9) (1899) I. L. R. 26 Calc. 874.
(10) (1905) I. L. R. 32 Calc. 295.
(11) (1906) 11 C. W. N. 173.
(12) (1890) I. L. R. 14 Bom. 441.
(13) (1900) I. L. R. 24 Mad. 124.
(14) W. R. (1864) Cr. 11.
(15) (1867) 7 W. R. Cr. 34
(16) (1867) 7 W. R. Cr. 102
(17) (1878) 1 C. L. R. 521
(18) (1898) I. L. R. 20 All. 459.
(19) (1901) I. L. R. 24 All. 143.
(20) (1902) I. L. R. 24 All. 258.
(21) (1907) I. L. R. 35 Calc. 103.

The petitioners appealed to the Judge who dismissed their appeal. But he said, "It seems to me that neither party can be said to have been in exclusive or undisturbed possession of the land . . . . I find that the appellants' common object was to enforce the right or supposed right of Sadai to cultivate the land as a tenant of Maniruddin, and that they committed rioting."

The Rule was, therefore, applied for and issued on the ground that the Judge had found the accused guilty of rioting with a different common object than that specified in the charge.

In support of the Rule it has been urged (i) that the accused committed no offence, as on the findings of the Judge the petitioners only exercised the right of private defence, (ii) that they have been convicted of rioting with a different common object from that specified in the charge, and (iii) that the two petitioners, Sadai Chand Saha and Sheikh Chamari, took no active part in the riot. They had no weapons and used violence to no one.

As to the first of these pleas, it appears to us that it cannot prevail. In our opinion the accused cannot be said to have been acting in the exercise of the right of private defence. They deliberately went to the land armed with deadly weapons and in very large numbers with intent to enforce their right or supposed right to the land. The witness Dengu says that as the petitioners passed his house on the way to the field Maniruddin said, "Come out *haramjada*, you and your sons. I am going to the field." This shows the petitioners went to the disputed field deliberately intending to fight, and defied the complainant and his father to come and oppose them. There was no occasion for their going to the field that day. The crop had been previously sown by the complainant and was growing. The petitioners were not suddenly called on to protect their rights or supposed rights. There was no attempt on the day of the occurrence to invade or encroach upon them. In any case, they had plenty time to have recourse to the authorities civil, criminal and police, and deliberately ignored them and took the law into their own hands In these circumstances, under section 99 of the Penal Code, no right of private defence can have arisen.

The second plea is of a very technical nature. The accused were charged with rioting with intent to dispossess the complainant

and then both together to desist and await the arrival of the Sub-Inspector, but remonstrances were in vain; the two armies ranged up, and a free fight ensued and lasted for a short time, after which the rioters on both sides dispersed. It was then noticed that one of the Iswa men had been so severely wounded as to be unable to move from the spot where he had fallen. This man, Mahar Singh, the Chero people are said to have made an attempt to carry away, and the Iswa people, according to the police, also tried to remove him altogether; but the constables very properly refused to let him be taken out of their sight, and they were present with him when he died in a hut hard by about a quarter of an hour later."

The Judge has then discussed the evidence very carefully and left the Jury to make up their minds as to the facts. He then goes on to say:—"I now come to deal with the question of right, title and possession, as to which a mass of evidence has been laid before you. *First*, there is the oral evidence. On the Iswa side a number of witnesses swear that the Pathari *pyne* lies entirely in Iswa, that it has always been repaired and maintained by the *maliks* of Iswa, and that the people of Chero have never had, nor exercised, any right to interfere with it in any way. On the other hand, the Chero witnesses allege that the Chero people have regularly excavated earth from the *pyne* so as to erect an *alang* along the western side, and it is argued, on the strength of certain admissions by Iswa witnesses as to the slope of the land, that, without such an *alang*, Chero could never grow a rice crop, as all the water would flow off their lands during the rainy season. Then Iswa produces a *thakbust* map of 1843, which seems to show that the northern branch at any rate of the *pyne*, *i.e.*, the so-called Pathari *pyne*, is in Iswa, while Chero produces a similar map and *khasra* and the counsel for the defence asks you to gather from it that in 1843 the *pyne* was in Chero. Next, the prosecution rely upon certain partition proceedings in 1901 between Iswa and Kalyanpur, but to these Chero admittedly was no party. Chero again file a number of old *rubakars* or decrees regarding a *pyne* apparently in their locality; but these relate to a dispute between Chero and Iswa, and I cannot myself see that the identity of the *pyne* referred to in

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Stephen and Mr. Justice Woodroffe.

1907
Dec. 19.

SHAHEBZADA MAHOMED KAZIM SHAH
v.
R. S. HILLS.*

Priority—Partition—Owelty—Allotment on partition—Mortgagee—Charge for owelty.

Where co-sharers have been awarded certain sums of money as owelty on a partition decree, they are entitled to priority over the mortgagees of a portion of the property partitioned.

APPEAL by the defendants, Shahebzada Mahomed Kazim Shah, Shaebzada Wally Mahomed Shah, and Shahebzada Mahomed Karim Shah, from the judgment of Harington J.

This was a suit brought by the plaintiff, Robert Savi Hills, against the 1st defendant, Shahebzada Fateh Mahomed Shah, for an account of what was due to him on two deeds, one dated the 13th April 1904, by which the 1st defendant mortgaged his undivided $\frac{1}{10}$th share in 52, 52-1, and 52-2 Park Street, and 1, Russa Road, in favour of the plaintiff, and another dated the 10th April 1905 under which there was assigned to the plaintiff a mortgage which had been created by the 1st defendant on his share in the Park Street property in favour of one Munshi Abdul Jalil. The 1st defendant, Shahebzada Fateh, did not dispute the plaintiff's claim, but the 2nd, 3rd and 4th defendants, the Shahs, claimed priority over the above mentioned mortgages for two sums of Rs. 37,000 and Rs. 9,500 respectively payable as owelty money which under a decree for the partition of the joint property had been declared a charge on the shares allotted to the mortgagor. The other set of defendants claimed under another mortgage which the plaintiff respondent admitted was prior to his. Harington J. in his judgment dated the 12th December

* Appeal from Original Civil, No. 62 of 1907, in Suit No. 461 of 1906.

As I have already told you, it is a question of fact whether a sword or a *lathi* is a deadly weapon and that is for you to decide. I have also told you in the case of Kabir, and I repeat it now once for all, that, even if you find point (*iv*) above not proved, it will be open to you to convict under the minor section 147, should you find the other essentials proved.

Now, apart from the *alibi* pleaded by some of the accused, the defence is that the Chero people, were not asserting any right, but were merely maintaining undisturbed the exercise of a right, and taking the necessary precaution to protect themselves from aggressive interference, and the learned counsel has cited a number of rulings drawing the distinction—referring in particular to one of 1875 and another of 1897—*Shunker Singh* v. *Burmah Mahto*(1) and *Pachkauri* v. *Queen-Empress*(2). Now even if the soundness of these decisions be accepted unquestioned, and I cannot help thinking that the case of 1897 goes dangerously far in the direction of allowing the subject to take the law into his own hands, the present case seems to me to be readily distinguishable. And here I ought to remind you that, where the right of private defence is set up, the *onus* shifts on to the accused, and it is for them to prove the plea.

In laying down the law I rely first, on the clear language of section 141 (*4*), which refers to an actual right as well as a supposed one, and then on a long series of rulings which begin with *Queen* v. *Jeolall*(3) and end with *Anant Pandit* v. *Madhusudan Mandal*(4). There can, I tell you, be no right of private defence, either on one side or on the other, where both parties are evidently aware of what is likely to happen and turn out in force. The right of private defence cannot be pleaded by persons who *expecting to be attacked go out of their way to court an attack*. When the parties of the complainant and accused are prepared to fight, it is immaterial who was the first to attack, unless it be shown that the accused were acting in the exercise of the right of private defence. If the accused—it was held by the Judges at Allahabad not many years ago, see *Queen-Empress* v. *Pray Dat*(5)—were determined to vindicate

(1) (1875) 23 W. R. (Cr.) 25.
(2) (1897) I. L. R. 24 Calc. 686.
(3) (1867) 7 W. R. (Cr.) 34.
(4) (1899) I. L. R. 23 Calc. 874.
(5) (1898) I. L. R. 20 All. 459.

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sent decree. Under the present practice, mortgagees are not made parties to a partition suit, but Sale J. has held that a mortgagee can watch proceedings, *Khetterpal Srittirutno* v. *Khelal Kristo Bhuttacharjee*(1). I do not understand how a mortgagee can attend in this manner. My mortgage was after the partition suit, but it was before the partition. In the Privy Council case *Byjnath Lall* v. *Ramoodeen Choudry*(2), the learned Judge did not consider the question of an unequal partition in the absence of fraud The point is still open as to what the rights of mortgagees of an undivided share are. In the partition suit the parties themselves do not say that the mortgagees are to have priority. The case of *Hem Chunder Ghose* v. *Thako Moni Debi*(3) is distinguishable from the present, in that case the parties had equal shares, but here that is not so. The parties have not said, nor has the Court said, that the mortgagees are to have priority. I submit therefore that the judgment of the Court below was right, and this appeal should be dismissed.

Mr. Hyam, for the plaintiff respondent. I do not claim priority as between the appellants and myself.

Mr. Sinha, in reply.

MACLEAN C.J. The question in this appeal is whether or not, in the circumstances I am about to state, the present appellants, to whom two sums of Rs. 37,000 and Rs. 9,500 have been awarded by way of owelty on partition, are entitled to priority over certain mortgagees, whom I will refer to as the Roy mortgagees, on a portion of the property which was partitioned.

The facts lie within a very narrow compass and are as follows:

A suit was instituted some time in 1901 to set aside a certain trust-deed To that suit all the parties either interested under the trust or who would be interested if the trust-deed were set aside were parties; and some of them apparently were minors. The result of that suit was that the trust-deed was set aside and, upon that decree being passed, the minors ceased to

(1) (1894) I. L. R. 21 Calc. 904. (2) (1874) L. R. 1 I. A. 106, 118.
(3) (1893) I. L. R. 20 Calc. 533.

who were the aggressors and the attacking party at the time of the occurrence. In support of his contention he has cited and relied on the following cases: *Queen* v. *Sohun*(1), *Queen* v. *Mitto Singh*(2), *Queen* v. *Sachee*(3), *Birjoo Singh* v. *Khub Lall*(4), *Shunker Singh* v. *Burmah Mahto*(5), *Ganouri Lal Das* v. *Queen-Empress*(6), *Moher Sheikh* v. *Queen-Empress*(7), *Pachkauri* v. *Queen-Empress*(8), *Anant Pandit* v. *Madhusudan Mandal*(9), *Poresh Nath Sircar* v. *Emperor*(10), *Bepin Behari Guha* v. *Pranakul Majumdar*(11), *Queen-Empress* v. *Narsang Pathabhai*(12), and *Queen-Empress* v. *Peelimuthu Tevan*(13).

Mr. Roy, for the Crown, on the other hand has replied that the Judge's charge contains no misdirection, that the Judge has correctly laid down the law, and that, as no failure of justice has in fact taken place in consequence of the alleged misdirection, the conviction of the appellants according to section 537 of the Criminal Procedure Code should not be set aside. He relies on the cases of *Queen* v. *Nowabdee*(14), *Queen* v. *Jeolall*(15), *Queen* v. *Mana Singh*(16), *In re Kalee Beparee*(17), *Queen-Empress* v. *Pray Dat*(18), *King-Emperor* v. *Kalpi*(19), *Emperor* v. *Kalhu Singh*(20), and *Jairam Mahton* v. *Emperor*(21).

There appears to me to be no necessity to discuss these cases at length. They lay down no general rule. Further, they have all been considered and commented on from time to time by the different Benches of this Court, and the facts of each case distinguished. They undoubtedly appear to be conflicting, and Mr. Norton has suggested that if we do not agree with the law as laid down in the cases he has cited, we should make a reference to a Full Bench. But we see no reason and consider it unnecessary to do so. The law of the Penal Code, however apparently

(1) (1865) 2 W. R. Cr. 59.
(2) (1865) 3 W. R. Cr. 41.
(3) (1867) 7 W. R. Cr. 112.
(4) (1873) 19 W. R. Cr. 66.
(5) (1875) 23 W. R. Cr. 25.
(6) (1889) I. L. R. 16 Calc. 206.
(7) (1893) I. L. R. 21 Calc. 392.
(8) (1897) I. L. R. 24 Calc. 686.
(9) (1899) I. L. R. 26 Calc. 574.
(10) (1905) I. L. R. 33 Calc. 295.
(11) (1906) 11 C. W. N. 176.
(12) (1899) I. L. R. 14 Bom. 441.
(13) (1900) I. L. R. 24 Mad. 124.
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(15) (1867) 7 W. R. Cr. 34.
(16) (1867) 7 W. R. Cr. 103.
(17) (1878) I C. L. R. 421.
(18) (1898) I. L. R. 20 All. 459.
(19) (1901) I. L. R. 24 All. 143.
(20) (1902) I. L. R. 24 All. 203.
(21) (1907) I. L. R. 35 Calc. 103.

The security was shifted, as the result of the partition, from the undivided share of the mortgagor on to the property directed to be conveyed to him under the decree.

This is not disputed Then arises the question of priority. To determine that question it becomes necessary to ascertain what was the substituted property which the mortgagor took under the partition. It is clear that all he took was the house No. 52-2 Park Street, subject to the charges of Rs. 37,000 and Rs. 9,500 in favour of the appellants; and it can only be upon that, that the Roy mortgagees can rank as mortgagees, that is, upon No. 52-2 Park Street subject to the charges created by the decree. But it is said that this was a consent decree. That does not seem to me to make any real difference unless the Roys can show that the partition effected was either the result of fraud, or unfair or improper as against the mortgagee who was not a party to the partition proceedings.

Undoubtedly, a person who advances money upon a mortgage of property which the mortgagor holds in an undivided share must be taken to take it subject to the liability of the property to be subsequently partitioned. Now, what is the attitude of the Roy mortgagees in this suit? Do they approbate or do they reprobate the partition proceedings? If we look at paragraph 2 of their written statement they ask that their mortgage may be regarded as the first charge upon the premises, No. 52-2 Park Street, "if it is shown that the partition was fair and proper." There is absolutely nothing to show, nor have we heard any argument, that it was unfair or improper.

The plaintiff then has come into Court upon the footing of adopting the partition proceedings; and if they adopt these proceedings their mortgage can only be on the interest of their mortgagor under the partition.

That interest has been already stated. This concludes the matter.

A point was made that the appellants must be taken to have surrendered their security, because the possession of the house No. 52-2 Park Street had, in accordance with the decree, been handed over to the mortgagor by the Official Trustee. I am unable to appreciate that argument. I cannot see why, if the

person or property of another person, must be restricted and recourse to public authorities must be insisted on. If a person prefers to use force in order to protect his property when he could, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable by the Indian Penal Code No matter what the intention of that person may be, the law says that he must not use force in such a case. To hold otherwise would be to encourage and put a premium on offences of rioting which are so frequent in this part of India. The country would, in the language of Holloway J., 'be deluged with blood' if an offender who could get relief by recourse to law is allowed to take the law into his own hands"

For these reasons, I am of opinion that there was no misdirection in the charge to the Jury by the Sessions Judge, and I would accordingly dismiss the appeal.

SHARFUDDIN J. This is an appeal by the present appellants who have been convicted and sentenced, as mentioned by my learned brother in his judgment. The trial was held with the assistance of a Jury whose unanimous verdict was that all the accused were guilty.

The facts of the case have been fully discussed by the learned Sessions Judge in the heads of his charge to the Jury, and also dealt with by my learned brother I need not, therefore, repeat them.

It has been urged on behalf of the appellants that there has been misdirection in the charge on a point of law, namely, that "in the case of a free fight deliberately engaged in by the parties it is wholly immaterial what the rights were or are." And that the misdirection has been further amplified by the learned Sessions Judge by directing the Jury "that there can be no right of private defence either on one side or the other when both parties are evidently aware what is likely to happen and turn out in force The right of private defence cannot be pleaded by persons who expecting to be attacked go out of their way to court an attack. When the parties of the complainant and the accused are prepared to fight, it is immaterial who was the first to attack

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was no pressing necessity to throw up any earth on the Chero side of this *pyne*—the next rainy season being some months after the occurrence.

From facts proved in the case and accepted by the Jury it is clear that the Chero people were fully aware that they would be attacked by the Iswa people. The Chero people numbered 400 or 500 including about 200 labourers. They were armed with swords and *lathis* and were led by Kabiruddin on horseback, who had only a whip in his hand. On the appearance of such a large body of men the Iswa people also began to collect their forces. In the meanwhile two chowkidars started for the *thana*, which is only four miles from the scene of occurrence, and only a mile from Chero, to give information of a likelihood of a breach of the peace. On receipt of the information two police constables arrived on the spot before the fighting had commenced. In spite of the remonstrances of these two constables fighting began and there was a regular combat. This fighting commenced on the Iswa people trying to cross the *pyne*.

On the above facts it is clear that the Chero people had full knowledge that they would be opposed by the Iswa people, and this is evidenced by the fact of their having gone fully armed and in such large numbers An assembly of such a large body of men indicates that they had not gone to the spot for any peaceful purpose. They knew quite well that they would be attacked and they went to the spot to meet force by force. The law does not delegate to any private individual the functions of those public servants who are specially charged with the protection of life and property and the apprehension of offenders In the present case there having been no pressing necessity for repairing the embankment, and there being ample time to seek protection of the authorities, the Chero people had no right to assemble, as they did, and court an attack by the Iswa people.

It is contended on behalf of the appellants that inasmuch as the Chero people had arrived on the spot admittedly a few hours before the Iswa people, the former had a right to defend the continuance of a state of things which, if altered, would have disturbed the *status quo ante*, and that the Chero people having arrived there first were maintaining their right of possession.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

1908
Feb. 4.

A. J. KING
v.
SECRETARY OF STATE FOR INDIA.*

Waiver—Jurisdiction—Leave to sue—Letters Patent (1865) cl 12.

Where there is no want of jurisdiction in this Court over the subject-matter of the action, but leave under cl. 12 of the Letters Patent is required before the Court can entertain the suit, the objection that such leave has not been properly obtained may be waived and will be considered to have been waived if the defendant files his written statement and applies for a commission to examine witnesses.

Moore v. *Gamgee* (1) followed.

ORIGINAL SUIT.

This suit was instituted by the plaintiff, Arthur John King to recover damages for wrongful dismissal. The plaintiff alleged that in 1884 he entered into an agreement with the Government of India for the management of the Government Tea gardens at Port Blair on a salary and commission, that in 1887 he entered upon his duties as manager, and that on the 18th July 1905 he was wrongfully dismissed from his employment, and thereby sustained serious loss and damage. In his plaint the plaintiff alleged that his cause of action arose partly in Calcutta, and prayed for leave under cl 12 of the Letters Patent to institute this suit. Leave to sue was obtained from the Master.

The defendant duly filed his written statement joining issue with the plaintiff on the terms of the agreement under which he was employed, denying that the plaintiff had suffered any damage, and submitting that the plaint disclosed no cause of action, and that, in the alternative, if any cause of action be established that any suit relating to plaintiff's contract should be brought at Port Blair under the Regulations relating to the Andaman Islands.

* Original Civil Suit No 463 of 1906.

(1) (1890) L. R. 25 Q. B. D. 244.

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v.
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Mr. Pugh (*Mr. Thornhill* with him), for the plaintiff. It is true that the order granting leave to sue under cl. 12 of the Letters Patent has been held to be a judicial act, and that such leave, if granted by the Master, was bad. But the defendant after filing his written statement has taken a further step in proceedings and applied for a commission. This recognises the suit as a pending suit and amounts to a waiver of objection to jurisdiction: see *In re Anglo-African Steamship Company*(1) and *Fry* v. *Moore*(2). It has been held in *Doss* v. *Secretary of State for India*(3), that the Secretary of State must be considered to be in India as well as in England, and is capable of being sued in India. I mention *In the matter of the "Fannie Skolfield"*(4), as it is desirable that all the authorities should be placed before the Court.

Cur. adv. vult.

FLETCHER J. The present application comes before me in a somewhat unusual manner.

This suit is brought by the plaintiff to recover damages for wrongful dismissal. The plaintiff in his plaint alleges that his cause of action arises in part in Calcutta and prays for leave under clause 12 of the Letters Patent to institute this suit. Leave to institute this suit was granted by the Master. The defendant duly filed his written statement and applied to Court for a commission to examine certain witnesses. Upon this application coming on for hearing before Woodroffe J., he directed the matter to be set down for argument as to whether or not the suit is validly pending in this Court, having regard to the fact that leave to institute the suit was obtained from the Master. Now it has been decided by a special Bench in this Court in the case of *Lakleshwar Singh* v. *Rameshwar Singh*(5) that the granting of leave under clause 12 of the Letters Patent being a judicial act cannot be delegated to the Registrar or Master, and that the rules of the

(1) (1886) L. R. 32 Ch. D. 348.
(2) (1889) L. R. 23 Q. B. D. 395.
(3) (1875) L. R. 19 Eq. 509.
(4) (1890) I. L. R. 17 Calc. 337.
(5) (1907) I. L. R. 34 Calc. 619.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Fletcher.

BOMWETSCH
v.
BOMWETSCH.*

1908
Feb. 19.

Marriage, nullity of—Deceased wife's sister—Illegitimate child—Custody of the child—Maintenance.

Where a decree for nullity of marriage had been made on the ground that the petitioner was the sister of the deceased wife of the respondent,

Held, that the child was the illegitimate child of the petitioner and that she was entitled, unless a strong case was made out to the contrary, to the custody of the child.

Maintenance for a child may be rightly and properly spent for the purpose of maintaining a joint home for the infant and his or her parent, and an account of the amount allowed for maintenance will not be ordered so long as the infant is properly maintained.

APPLICATION.

A decree for nullity of marriage was made on the 10th May 1907 on the petition of Isabel Edna Bomwetsch, on the ground that the petitioner was the sister of the deceased wife of the respondent, G. S. Bomwetsch. A reference was directed to the Registrar to enquire and report what would be a fit and proper amount to be allowed for the maintenance of the infant daughter of the petitioner, and the Registrar reported that Rs. 75 a month during the hot weather and Rs. 50 a month during the cold weather would be a proper allowance for the maintenance of the infant; and the petitioner was given the custody of the infant.

The respondent now applied to vary that order on the ground that the petitioner was not a fit and proper person to have the custody of the child.

Mr. Mehta, for the respondent. Under s. 41 of the Indian Divorce Act the Court has jurisdiction in the case of nullity of marriage to make orders with respect to the custody of minor

* Application in Original Civil Suit (Matrimonial) No. 6 of 1907.

1908
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v.
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OF STATE
FOR INDIA.
FLETCHER J.

for a prohibition to prohibit the proceeding in that action. Now pausing here for a moment it will be noticed that section 74 of the County Courts Act is very similar to clause 12 of the Letters Patent. Doubtless in cases under section 74 of the County Courts Act leave may be granted by the Judge or the Registrar, whereas under clause 12 of the Letters Patent leave must be granted by a Judge. But in *Moore* v. *Gamgee*(1) no leave at all had been granted, and there can be no distinction between the case where no leave at all has been granted and a case where leave had been granted by a person not authorised to grant leave.

The judgment of the Court in Moore v. *Gamgee*(1) *refusing* the application for a prohibition was delivered by Cave J., who in the course of his judgment made the following pertinent remarks:—

"There are two senses in which it may be said there is no jurisdiction to entertain an action—first, where under no circumstances can the Court entertain the particular kind of action, as in cases within section 56 of the Act—that is, libel, slander, seduction, or breach of promise of marriage; secondly, there are the cases provided for by section 74, where under certain circumstances leave can be given to bring an action which the Court could not otherwise entertain; in these cases there is no want of jurisdiction over the subject matter of the action, but leave is required in the particular case before the Court can entertain the action, and it is an objection which may be taken to the hearing of the action, that the defendant does not dwell or carry on his business within the jurisdiction, and leave has not been obtained. In the present case the plaint was issued, and the case was heard, and partly decided, before the objection was taken. There is always some difficulty in drawing an analogy between proceedings in the High Court and proceedings in the County Court, because the High Court has jurisdiction by the common law, whereas the jurisdiction of the County Court is entirely created by statute; but there is some analogy between such a case as the present and a case in the High Court, where it is sought to serve a writ on a defendant who is resident abroad. In such a case in the High Court, if the defendant is served and takes any step in the action, except

(1) (1890) L. R. 25 Q. B. D. 244, 248.

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FLETCHER J.

What is the evidence produced on the present application? The only material allegation is the one made in the affidavit of Mrs. Fooks that in April 1906 the petitioner misconducted herself with a Mr. Musgrove, but that was some time before the order for the custody of the child was made In my opinion, no evidence has been given that since the order giving the petitioner the custody of the child and the order allowing maintenance, the petitioner has misconducted herself.

The real point seems to be that the lady is practically without any means and naturally the maintenance is spent by her in maintaining a home for herself and her child. The respondent seems to object to this and he wishes that the maintenance should be solely spent for the child. That is not a good ground of objection. It has been decided over and over again in the Chancery Courts that maintenance for a child may be rightly and properly spent for the purpose of maintaining a joint home for the infant and his or her parent, and an account of the amount allowed for maintenance is not ordered so long as the infant is properly maintained. It seems to me that no grounds have been made out for re opening the question as to the custody of the infant. I, therefore, dismiss this application with costs.

Application refused.

Attorneys for the petitioner · *Carruthers & Co.*

Attorney for the respondent : *K. M Rukhit.*

J. C.

CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

1908
Jan. 17.

ADAM SHEIKH
v.
EMPEROR.*

Surety, fitness of—Inability to control person bound down.

The test of the fitness of a surety is not whether he can supervise the person bound down, but whether he is a person of sufficient substance to warrant his being accepted.

Abinash Malakar v. *Empress* (1), *Ram Pershad* v. *King-Emperor* (2) followed.

Queen-Empress v. *Toni*(3) and *Queen-Empress* v. *Rahim Bakhsh*(4) dissented from.

THE petitioner was bound down on the 20th March 1907 by the Deputy Magistrate of Mymensingh, under s. 118 of the Criminal Procedure Code, to be of good behaviour in the sum of Rs. 200 with two sureties each in the like amount. Thereupon two persons, Babon Mandal of Birampur and Solim Sheikh of Chak Bistupur, offered themselves as sureties. The Magistrate directed the police to enquire into the circumstances of the proposed sureties, and, after receiving a report to the effect that they were men of substance, but that it was doubtful whether they would be able to keep the man under control, rejected them on this ground by his order dated the 16th May. An application was made against the said order to the Sessions Judge of Mymensingh, but he refused it on the 6th June.

Babu Harendra Narain Mitra, for the petitioner. The Magistrate has relied on the Allahabad rulings of *Queen-Empress* v. *Toni*(3) and *Queen-Empress* v. *Rahim Bakhsh* (4). But they are

* Criminal Revision No. 1306 of 1907, against the order of A. J. Chotzner, Sessions Judge of Mymensingh, dated June 4, 1907.

(1) (1900) 4 C. W. N. 727.
(2) (1902) 6 C. W. N. 593.
(3) (1892) All. W. N. [illegible]
(4) (1898) I. L. R. [illegible]

and he accordingly convicted the accused. They appealed to the Sessions Judge who held that neither party was in exclusive or undisturbed possession, but the appellants' common object was to enforce the right or supposed right of the petitioner, Sadai Chand and to cultivate the land as a tenant of Maniruddin; and he dismissed the appeal. The petitioners then moved the High Court and obtained the present Rule.

Babu Sarat Chandra Roy Chowdhry, for the petitioners.

RAMPINI AND SHARFUDDIN JJ. This is a Rule to show cause why the conviction of, and sentences passed on, the three petitioners, *viz.*, Maniruddin, Sadai Chand Saha, and Sheikh Chamari, should not be set aside. The three petitioners have been convicted by the Sub-divisional Magistrate of Habiganj of offences under section 148 of the Penal Code and sentenced Maniruddin to eight months' and the other two to six months' rigorous imprisonment. The petitioner, Maniruddin, has further been convicted of an offence under section 324 of the Penal Code and sentenced to undergo a further term of four months' rigorous imprisonment.

The facts are that the accused on the 8th March last were members of a large body of men, about 40, 50 or 60 in number, who came armed with *lathis*, *tikals* (or spears) and *kuchasalas* (apparently heavy billets of wood), and attacked the complainant, Basir Mahomed, and his father Dengu, severely wounded them and destroyed the crops sown by the complainant on a certain piece of land. There had been a partition of certain land of which the disputed plot formed a part. There was a dispute as to the share to which the disputed plot had fallen on partition. The complainant claimed it as having fallen to the share of his landlord. The accused, Maniruddin, raised a similar contention. The Magistrate found that the complainant was in possession and had grown the crops destroyed by the accused. He, therefore, charged the accused with rioting armed with dangerous weapons "with the common object of dispossessing Basir Mahomed from certain land in his possession, and with having used violence in prosecution of that common object."

PRIVY COUNCIL.

P.C.*
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Jan. 24.

BAIJNATH RAM GOENKA
v.
RAMDHARI CHOWDHRY
AND
DEO NANDAN PERSHAD
v.
RAMDHARI CHOWDHRY.

[On appeal from the High Court at Fort William in Bengal.]

Mahomedan law—Pre-emption—Ceremonies, due performance of—Talab-i-ishhad—Reversal by High Court of decision of First Court on question of fact—Withdrawal from Court by pre-emptors of money paid by purchaser to redeem mortgage on property sold—Waiver of right of pre-emption.

The right of pre-emption under Mahomedan law must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude; and any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. Whether there has been such delay is a question to be determined upon the facts of each particular case.

In this case it was held by the Judicial Committee that the grounds stated by the High Court for overruling the decision of the Subordinate Judge, that the ceremony of *talab i-ishhad* had been duly performed without unreasonable delay, were insufficient.

Where the pre-emptors had obtained the transfer of a zurpeshgi mortgage binding the property the sale of which gave rise to the suit for pre-emption, and the purchaser after the sale had paid the mortgage money into Court in accordance with the provisions of the Transfer of Property Act (IV of 1882) for the purpose of redeeming the mortgage:—

Held, that the withdrawal of the money by the pre-emptors was not a recognition of the title of the purchaser, but merely of his right to redeem, and was quite consistent with their right to pre-emption.

Two consolidated appeals from judgments and decrees (20th January 1904) of the High Court at Calcutta, which reversed judgments and decrees (31st March 1900) of the Court of the Subordinate Judge of Monghyr.

**Present:* LORD ROBERTSON, LORD COLLINS, AND SIR ARTHUR WILSON.

from certain land. The Magistrate found them guilty of rioting with this intent. The Judge thinks the question of possession of the land is not clear, but says that in any case the accused committed an offence under section 148 of the Penal Code, as they committed rioting with the intention of enforcing their rights or supposed rights to the land The difference between the common object charged by the Magistrate and that held by the Judge to have actuated the accused, is very slight. Both common objects raise the same questions, and the accused have in no way been prejudiced or misled in their defence so as to induce them to omit to bring forward any evidence. They know very well they were charged with an offence under section 148 of the Penal Code, and that it was advisable for them to establish their claims to the land, in order to justify their proceedings. In fact, they were charged with a more serious, and have been found to have been actuated by a somewhat similar, but less serious, common object.

The petitioners' third plea seems to us not to be correct. There is ample evidence that both Sadai Chand Saha and Chamari carried weapons and took an active part in the riot. Thus Basir Mahomed says: "Chamari beat me on my right leg with a *lathi*. Nobin Chamar, Mansar, Sadai Shaha and Lakub beat me with *lathis* and also my father" Dengu says "Chamari struck me on my left hand with a *lathi*" Biramuddin says, "Chamari beat Dengu." Koda Julla says: "Chamari struck him (Basir) with a *lathi* on the head Jasud, Sadai Shaha, and Nobin and all the accused beat with *lathis* and pick-axes" Hridoy Mistri and Mohabutulla give similar evidence There can, we think, be no doubt that the second and third petitioners took an active part in the riot and are not deserving of any leniency.

The Magistrate observes: "Maniruddin is clearly the person who deliberately engineered the riot, and it appears that he has spent most of his life doing this sort of thing, having been imprisoned several times for similar offences. His offence, therefore, requires an extra severe punishment."

We accordingly discharge the Rule.

Rule discharged.

S. H. M.

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BAIJNATH RAM GOENKA
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[On appeal from the High Court at Fort William in Bengal.]

Mahomedan law—Pre-emption—Ceremonies, due performance of—Talab-i-ishhad—Reversal by High Court of decision of First Court on question of fact—Withdrawal from Court by pre-emptors of money paid by purchaser to redeem mortgage on property sold—Waiver of right of pre-emption.

The right of pre-emption under Mahomedan law must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude; and any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. Whether there has been such delay is a question to be determined upon the facts of each particular case.

In this case it was held by the Judicial Committee that the grounds stated by the High Court for overruling the decision of the Subordinate Judge, that the ceremony of *talab i-ishhad* had been duly performed without unreasonable delay, were insufficient

Where the pre-emptors had obtained the transfer of a zurpeshgi mortgage binding the property the sale of which gave rise to the suit for pre-emption, and the purchaser after the sale had paid the mortgage money into Court in accordance with the provisions of the Transfer of Property Act (IV of 1882) for the purpose of redeeming the mortgage:—

Held, that the withdrawal of the money by the pre-emptors was not a recognition of the title of the purchaser, but merely of his right to redeem, and was quite consistent with their right to pre-emption.

Two consolidated appeals from judgments and decrees (20th January 1904) of the High Court at Calcutta, which reversed judgments and decrees (31st March 1900) of the Court of the Subordinate Judge of Monghyr.

*Present: LORD ROBERTSON, LORD COLLINS, AND SIR ARTHUR WILSON.

1906 held, that no agreement (*e.g.*, such as in this case, viz. that the owelty money should be a charge on the Park Street property) between the parties to a partition suit even though embodied in a High Court decree could affect the rights of a mortgagee who was no party to the proceedings. That the Shah defendants had given up possession of the share in No. 52-2 Park Street without getting payment, thereby surrendering the security which they had for enforcing the payment of owelty, and had done so by making an arrangement by which they affected to create a charge on the property comprising the mortgagor's $\frac{1}{10}$th share, and they would be, but for the agreement, in the position of ordinary judgment-creditors entitled to execute their decree for owelty money against the mortgagor's property by attachment and sale, but such sale would be subject to any encumbrances created by the mortgagor. The learned Judge further held that the Shah defendants were entitled to a mortgage decree for the sums claimed as owelty, but that such sums were to be paid after the other charges had been satisfied.

From this judgment the Shah defendants appealed.

Mr. S. P. Sinha (Standing Counsel) (*Mr. Buckland* with him), for the appellants. A mortgagee of an undivided share in the absence of fraud is bound by the partition proceedings *Byjnath Lall* v. *Ramoodeen Chowdry*(1), *Sharat Chunder Burmon* v. *Hurgobindo Burmon*(2), *Hem Chunder Ghose* v. *Thako Moni Debi*(3), *Khetterpal Srittirutno* v. *Khelat Kristo Bhuttacharjee* (4), *Pullamma* v. *Pradosham*(5), *Amolak Ram* v. *Chandan Singh*(6), Ghose's Law of Mortgage in India, 3rd Ed., page 353. Each co-sharer is entitled to partition or to mortgage his share. When the defendants took the property they took an undivided share, and the only way they can disturb the partition is to show that there has been fraud. The property being subject to a charge must be taken subject to that charge.

Mr. Garth (*Mr. S. R. Das* with him), for the respondent (2nd defendant). In the first place the partition decree is a con-

(1) (1874) L. R. 1 I. A. 106, 118.
(2) (1878) I. L. R. 4 Calc. 510.
(3) (1893) I. L. R. 20 Calc. 533.
(4) (1894) I. L. R. 21 Calc. [illegible].
(5) (1895) I. L. R. 18 Mad. 316.
(6) (1902) I. L. R. 24 All. 483.

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8-anna share in the taluqa, of which the usufructuary mortgagees remained in possession; that after the sale by Sundarbati to the plaintiffs on 9th July 1897, Anupbati having taken no steps to pay off her share of the sudhbharna debt, the plaintiffs deposited in Court under section 83 of the Transfer of Property Act, the entire debt, Rs. 63,000, and obtained a transfer of the mortgage; that they were willing to purchase the share of Anupbati also, but without their knowledge and consent she sold her 4-anna share to the defendant Nirbhoy Chowdhry. The plaintiffs also alleged that the first information they had of the sale was on 20th December 1897 and 15th January 1898 respectively, that they had duly complied with the requirements of the Mahomedan law for the assertion of their right of pre-emption, and that the amount entered in the deed of sale as the consideration was not actually paid. Each plaintiff made the other a defendant in his suit, and claimed a right of pre-emption over the whole property in suit; but if one was found entitled to only one-half of the property, then it was asked that each plaintiff should be awarded possession of a moiety of the same on depositing the purchase-money in equal shares.

The defence was a denial that the consideration set out in the deed of sale was not paid, and pleas to the effect that the plaintiffs had failed to comply with the formalities required by the Mahomedan law of pre-emption for the due assertion of a right to pre-empt; and that they were estopped by their conduct from claiming the right of pre-emption. The defendants, Nirbhoy Chowdhury and Anupbati Koeri, denied that the 20th December 1897 and 5th January 1898 were respectively the earliest dates on which the plaintiff's had become aware of the sale; and alleged that they had previously known and acquiesced in the negotiations and agreement and execution of the sale deed relating thereto; that the formalities were not carried out at the proper time and place; that the plaintiffs induced Sundarbati to sell them her 4-anna share by promising to pay to her any excess price which Anupbati might obtain; that they refused to purchase Anupbati's share for a higher price than Rs. 36,000; and that they were never ready and desirous to purchase her share at a proper price. The defendant Anupbati further stated that the

have any further interest in the estate. By the decree in that suit, which is dated the 8th of August 1904, all the parties who, upon the trust-deed being set aside, became entitled to the property in certain shares, agreed amongst themselves to have it partitioned The estate at the time was vested in the Official Trustee; and, under the decree, the Official Trustee was ordered to convey to Fateh Mahomed Shah, the mortgagor, to the Roy mortgagees, the house and premises No. 52-2 Park Street in Calcutta. By the same decree it was ordered and decreed "with the like consent (*i. e* of all the parties interested in the properties) that Fateh Mahomed Shah (the mortgagor) should pay to the present appellant two several sums of Rs. 37,000 and Rs 9,500 as in the decree directed, and it was declared with the like consent that the said two sums of Rs. 37,000 and Rs. 9,500 respectively formed a charge upon the premises No. 52-2 Park Street allotted to Fateh Mahomed Shah, and that the allotments made to the various parties (including the mortgagor) should stand charged with the respective incumbrances and charges created by them respectively over their respective shares and interests in the aforesaid properties."

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The mortgages under which the Roys claim are dated (1st) the 29th of January 1902, (2nd) the 2nd of June 1902, and (3rd) the 2nd of September 1902; and they were mortgages to secure an aggregate principal sum of Rs. 18,000 with interest at 1% per cent. per annum with quarterly rests. The security was the share of the mortgagor in the various properties which had not then been partitioned The result of the partition proceedings was to give to the mortgagor the house No 52-2 Park Street, subject to the charge for the two sums of Rs 37,000 and Rs. 9,500, and the question now is as between the present appellants and the Roy mortgagees, whether the appellants are entitled, in respect of those sums, to priority over the Roy mortgagees. The learned Judge in the Court of first instance has held that they are not; and consequently they have appealed.

It is quite clear that after the partition was effected, the mortgagee was entitled to regard his mortgages as attaching to the house No. 52-2 Park Street, in substitution for the security on the mortgagor's undivided share in the property generally.

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8-anna share in the taluqa, of which the usufructuary mortgagees remained in possession; that after the sale by Sundarbati to the plaintiffs on 9th July 1897, Anupbati having taken no steps to pay off her share of the sudhbharna debt, the plaintiffs deposited in Court under section 83 of the Transfer of Property Act, the entire debt, Rs. 63,000, and obtained a transfer of the mortgage; that they were willing to purchase the share of Anupbati also, but without their knowledge and consent she sold her 4-anna share to the defendant Nirbhoy Chowdhry. The plaintiffs also alleged that the first information they had of the sale was on 20th December 1897 and 15th January 1898 respectively, that they had duly complied with the requirements of the Mahomedan law for the assertion of their right of pre-emption, and that the amount entered in the deed of sale as the consideration was not actually paid. Each plaintiff made the other a defendant in his suit, and claimed a right of pre-emption over the whole property in suit; but if one was found entitled to only one-half of the property, then it was asked that each plaintiff should be awarded possession of a moiety of the same on depositing the purchase-money in equal shares.

The defence was a denial that the consideration set out in the deed of sale was not paid, and pleas to the effect that the plaintiffs had failed to comply with the formalities required by the Mahomedan law of pre-emption for the due assertion of a right to pre-empt; and that they were estopped by their conduct from claiming the right of pre-emption. The defendants, Nirbhoy Chowdhury and Anupbati Koeri, denied that the 20th December 1897 and 5th January 1898 were respectively the earliest dates on which the plaintiff's had become aware of the sale; and alleged that they had previously known and acquiesced in the negotiations and agreement and execution of the sale deed relating thereto; that the formalities were not carried out at the proper time and place; that the plaintiffs induced Sundarbati to sell them her 4-anna share by promising to pay to her any excess price which Anupbati might obtain; that they refused to purchase Anupbati's share for a higher price than Rs. 36,000; and that they were never ready and desirous to purchase her share at a proper price. The defendant Anupbati further stated that the

mortgagor were put into possession by the Official Trustee, and in accordance with the decree, the appellants have lost their right to the charge which is specifically created by that decree in their favour.

There is one argument of Mr. Garth which I ought to notice. It is said that if a transaction of this sort can stand, the result may be that co-sharers may on a partition, knowing that one of them has mortgaged his share, so arrange matters that he should get no portion of the immoveable property on the partition, but receive the whole of his share in cash, the effect of which would be to defeat the rights of his mortgagee. We are not dealing with that case now: there is no suggestion that this partition was unfair, improper, at any rate, there is no evidence of it. If such a case arise, as Mr. Garth suggests, I dare say the Courts will be able to deal with it satisfactorily.

The appeal must succeed. The appellants must have, as between themselves and the Roy mortgagees, who must pay them, the costs of this appeal and also the extra costs which have been occasioned by the raising of the present point in the Court of first instance and which they were ordered to pay.

Mr. Sinha's clients, the defendant appellants, must in the first instance pay the plaintiff's costs and may add them to their security.

STEPHEN J. I agree I would add that it is quite plain that the appellant's claim, which is a charge upon the property, constitutes a deduction from the *corpus* of the property and is not affected by any dealings with the possession of the property on which the decision of the Judge of the Court of first instance is based.

WOODROFFE J. I agree with the judgment of the learned Chief Justice.

Attorney for the appellants: *Narendra Nath Mitter.*

Attorneys for the respondents: *Gregory & Jones, Sashi Sekhar Banerjee* and *Kali Das Bhanja.*

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December 1897 the agent applied for a copy of the deed of sale which he received on 30th December and forwarded by registered post on 31st to Jowhari Lal to whom it was delivered on 4th January 1898. It reached the Monghyr post office on 2nd January but the statement of the postal peon that he went to deliver the cover to Jowhari Lal on the 2nd was incorrect as that day was a Sunday and under the postal rules no registered letter could have been delivered on that day; the peon went to deliver it on 3rd January but found Jowhari not at home and delivered it to him on 4th. On 5th January Mangniram consulted Mr. Scott, a local Barrister. On 6th January both plaintiffs applied for a police guard to protect their agents who were taking the purchase money to tender it to Nirbhoy Chowdhry at Maheshpur, and on 7th January the *talab-i-istishad* was made at his house. On the 8th January 1898 arrangements were made to go to Anupbati's house and to the property sold. The 9th January was a Sunday and no steamers were running. On 11th and 12th January the *talab-i-istishad* was made on the property itself and at the house of Anupbati Koeri.

On the 5th and 6th issues the Subordinate Judge found that there was no satisfactory evidence that Anupbati's sale "was effected with the knowledge and consent of the plaintiffs, tacit or express," nor to show "that they positively declined to make the purchase, or that they told Anupbati to sell her share to any one she liked for a higher price." As to the plea of estoppel by conduct, the Subordinate Judge said: "I find in the first place that there is no reliable evidence to show that Nirbhoy Chowdhry was induced by the plaintiffs to buy the property in dispute, or that they waived their right of pre emption by any act on their part. The Mahomedan law is and that the waiver relinquishment on the part of the pre-emptor must take place after and not before the sale." He also held that the actual consideration for the sale was Rs. 37,000. In the result he made a decree in favour of each of the plaintiffs for pre-emption of one-half of the property sold, on payment of one-half of the Rs. 37,000.

On appeal the High Court (RAMPINI and PRATT JJ.) agreed with the Subordinate Judge as to the performance of the *talab-i-mowasibat* by both the plaintiff's as soon as they heard of the

mortgagor were put into possession by the Official Trustee, and in accordance with the decree, the appellants have lost their right to the charge which is specifically created by that decree in their favour.

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There is one argument of Mr. Garth which I ought to notice. It is said that if a transaction of this sort can stand, the result may be that co-sharers may on a partition, knowing that one of them has mortgaged his share, so arrange matters that he should get no portion of the immoveable property on the partition, but receive the whole of his share in cash, the effect of which would be to defeat the rights of his mortgagee. We are not dealing with that case now: there is no suggestion that this partition was unfair, improper, at any rate, there is no evidence of it. If such a case arise, as Mr. Garth suggests, I dare say the Courts will be able to deal with it satisfactorily.

The appeal must succeed. The appellants must have, as between themselves and the Roy mortgagees, who must pay them, the costs of this appeal and also the extra costs which have been occasioned by the raising of the present point in the Court of first instance and which they were ordered to pay.

Mr. Sinha's clients, the defendant appellants, must in the first instance pay the plaintiff's costs and may add them to their security.

STEPHEN J. I agree I would add that it is quite plain that the appellant's claim, which is a charge upon the property, constitutes a deduction from the *corpus* of the property and is not affected by any dealings with the possession of the property on which the decision of the Judge of the Court of first instance is based.

WOODROFFE J. I agree with the judgment of the learned Chief Justice.

Attorney for the appellants: *Norendra Nath Mitter.*

Attorneys for the respondents: *Gregory & Jones, Sashi Sekhar Bonerjee* and *Kali Das Bhanji.*

R. C. M.

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registered copy of the deed of sale. The plaintiff was evidently during these two days trying to gain time for the purpose of reflection. Then, the plaintiff Jowhari Lal was according to his own showing in possession of all the information he required for the *talab-i-istishad* on the 4th January by 4 o'clock P. M. But the *talab-i-istishad* was not made on his behalf till the 7th January, though the purchaser's house was at a distance of only 7 miles. He explains that he was engaged during this time in consulting a Barrister named Mr. Scott, as to how he should procure a police guard and in procuring a police guard and this is also the excuse given by the plaintiff Mangni Ram for his delay from the 5th to the 7th January. But it is unquestionable that this was an unnecessary delay. It is not necessary according to the Mahomedan Law to tender the money at the time of making *talab-i-istishad*, so there was no necessity for any police to guard the money. Besides, the agent of the plaintiff, Mangni Ram, took his money in notes, which he could carry on his person, so in his case the police guard was doubly unnecessary. The cases of both plaintiffs must therefore fail on this ground. This being so, it is, strictly speaking, unnecessary for us to consider the other grounds of appeal. But we would wish to record that we are further unable to agree with the findings of the Subordinate Judge that there was no waiver on the plaintiffs' part of the right of pre-emption and that the price paid for the property was not Rs. 44,850 but only Rs 37,000. . . . . We would only remark in conclusion there is in our opinion no force in the plea that the plaintiffs ratified the sale to the defendant. They may have accepted small sums out of the purchase money in payment of debts due to them, but they never intended, we consider, to ratify the sale, nor can their act be regarded as amounting to ratification. Moreover, this plea was not expressly taken in the written statements of the defendants or pressed in the Lower Court."

The High Court, therefore, decreed the appeals and dismissed the suits

On these appeals,

DeGruyther and *G. H. A. Branson*, for the appellants, contended that they had duly complied with the provisions of the Mahomedan law in regard to the ceremony of *talab-i-istishad* and made a formal declaration of their intention to pre-empt, without delay; and discussed the evidence on this point to show that this had been done with as little delay as possible, and that the High Court had been wrong in reversing the decision of the Subordinate Judge in the appellants' favour. Reference was made to Baillie's Hamilton's Hedaya page 487; Baillie's Hedaya Vol. III page 569 (1791 Ed.); *Jarfan Khan* v. *Jabbar Meah* (1); Baillie's Digest of Mahomedan Law, page 481,

(1) (1884) I. L. R. 10 Calc. 383.

On the defendant subsequently applying for a commission to examine certain witnesses, it was directed that the matter be set down for argument as to whether or not this suit was validly pending in this Court having regard to the fact that leave to institute the suit was obtained from the Master. It has previously been held by the Court in this suit that the Secretary of State for India in Council could not be said to reside within the jurisdiction of this Court, so that leave to sue under cl. 12 of the Letters Patent was necessary.

The Standing Counsel (*Mr. Sinha*), for the defendant. It is clear that the leave to institute this suit obtained from the Master was not properly obtained: *Lalliteshwar Singh* v. *Kameshwar Singh*(1). The question now is whether by filing his written statement the defendant has waived his right to object that proper leave has not been obtained. Such leave under cl. 12 of the Letters Patent affects the very foundation of the jurisdiction: see *Rampurtab Samruthroy* v. *Premsukh Chandamal*(2). The position in England is very different: see *Preston* v. *Lamont*(3).

[FLETCHER J. *In re Anglo-African Steamship Company*(4) expressly decides that this power is not inherent in the Court.]

The present matter does not come under that class of cases where by appearing without protest I may be taken to have waived the question of jurisdiction. The plaintiff has filed this suit in this Court without jurisdiction. There cannot be waiver of objection to jurisdiction. Even by consent I could not give this Court jurisdiction without the Court's leave see *Ledgard* v. *Bull*(5). Objection to jurisdiction can be taken at any stage of the proceedings, even at the hearing of a suit and even on a second appeal. The authorities will be found collected at p 98 of O'Kinealy's Code of Civil Procedure, 6th edition. We have taken no further step in proceedings since discovering that the Master was incompetent to grant leave under cl. 12 of the Letters Patent. *Keate* v. *Phillips*(6) and *Gurdeo Singh* v. *Chandrika Singh*(7) were also referred to.

(1) (1907) I. L. R. 34 Calc. 619.
(2) (1890) I. L. R. 15 Bom. 93.
(3) (1876) 1 Exch. D. 361.
(4) (1886) L. R. 32 Ch. D. 348.
(5) (1886) I. L. R. 9 All. 191; L. R. 13 I. A. 134, 145.
(6) (1878) W. N. 152.
(7) (1907) 5 C. L. J. 611.

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DeGruyther, in reply, referred to *Jamilan* v. *Latif Hossein*(1).

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. These two consolidated appeals arise out of two suits, one brought by Mangni Ram, the other by Jowhari Lal, to enforce a right of pre-emption in respect of a share in certain properties comprised in taluka Rasulpur Bhalowni.

By conveyances, dated 28th January 1891 and 9th July 1897, Mangni and Jowhari had become the owners in equal shares of 12 annas of the property. The remaining four annas belonged to the respondent, Anupbati Koeri, who on the 17th December 1897 sold those four annas to Nirbhoy Chowdhry; and that is the sale against which the right of pre-emption is claimed. It has been found that Jowhari first heard of the sale on 20th December 1897, and thereupon he at once made the immediate claim to pre-empt which the law requires. Mangni first heard of the sale on the 5th of January 1898, and at once made his immediate claim. No question therefore arises with regard to the first claim by each of the two men. The principal controversy between the parties, and the point on which the Courts below have differed, is an alleged delay in making the second claim, the claim with witnesses, which also is required by law.

Jowhari, on hearing of the sale, which he did at Monghyr, at once sent to his Agent at or near Gogri to procure from the Registry Office a copy of the sale deed. The Agent obtained that copy and sent it to Jowhari, who actually received it on the 4th January. The High Court, differing from the Subordinate Judge, has found unreasonable delay at two points of these proceedings. It has held, *first*, that the copy from the Registry was not obtained and sent off as soon as it might have been. But an examination of the official calendar shows clearly that the learned Judges were led to this conclusion by a misapprehension as to the time during which the Registry Office was closed for the Christmas vacation. The High Court held, *secondly*, that Jowhari was guilty of wilful delay by his refusal to receive the packet containing the copy of the sale deed from the Post Office

(1) (1871) 8 B. L. R. 160, 164; 16 W. R. (F. B.) 13, 14.

High Court in so far as they authorise the Registrar or Master to grant such leave are *ultra vires*.

But neither in that case nor in the present case until I pointed out the question to counsel was it argued whether the objection that the leave was granted by the Registrar or Master is one which can be waived. If the objection is one that cannot be waived the matter is one of far-reaching consequences. It means that in every case where the suit has proceeded even to judgment, the defendant can turn round and say that the whole proceedings are a nullity. Fortunately in my opinion this is not the result. The case is I think covered by the authority of *Moore* v *Gamgee*(1) which though not referred to in the argument before me is not distinguishable from the present case. In that case there was an application by the defendant for a prohibition directed to the Judge of the County Court of Surrey to prohibit the proceedings in an action by the plaintiffs against the defendant in that Court. By the County Courts Act, 1888 (51 and 52 Vic. C. 43), section 74, it is provided that "Every action or matter may be commenced in the Court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced by leave of the Judge or Registrar in the Court within the district of which the defendant or one of the defendants dwelt or carried on the business at any time within six calender months next before the time of commencement or with the like leave in the Court in the district of which the cause of action or claim wholly or in part arose"

At the hearing of that action on the second day the solicitor for the defendant took the objection that the Court had no jurisdiction to entertain the action on the ground that the defendant did not dwell or carry on his business within the district of the Court at the time of the commencement of the action, and no leave had been obtained to bring the action in that Court. The County Court Judge held that the defendant by appearing and contesting the action had waived the objection and proceeded with the hearing. The defendant accordingly applied to a Divisional Court of the Queen's Bench Division (Cave and A. L. Smith JJ.)

(1) (1890) L. R. 25 Q. B. D. 244.

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mortgage money into Court, in accordance with the provisions of the Transfer of Property Act, for the purpose of redeeming the mortgage; after some hesitation the two plaintiffs took out that money. It was contended that by so doing they had recognised the title of Nirbhoy under his purchase and could not claim pre-emption.

Their Lordships cannot agree with this contention. Until a decree for pre-emption was made, Nirbhoy owned the land as purchaser, and had a right to redeem. The taking out of the money by the plaintiffs, as mortgagees, was no recognition of anything more than this, and was quite consistent with the claim to pre empt.

There remains only one other point for consideration, as to which again the Courts in India have differed; and that is as to the amount actually paid by Nirbhoy to Anupbati, the difference being Rs. 7,850. As to this point their Lordships do no find a clear and positive finding by the Subordinate Judge that the full sum named in the deed of sale was not in fact paid; and they are not prepared to dissent upon this point from the judgment of the High Court.

Their Lordships will humbly advise His Majesty that these appeals should be allowed; that the decrees of the High Court should be discharged with costs; that the decrees of the Court of the Subordinate Judge should be varied by directing the price of pre-emption to be calculated on the sum of Rs. 44,850 (the price named in the deed of sale from Anupbati to Nirbhoy) and the amounts to be deposited in the Court of the Subordinate Judge within such times as the High Court or the Subordinate Judge may determine; that subject to these variations and the payment to the appellants of additional costs, if any, the decrees of the Subordinate Judge should be restored; and that the cases should be remitted to the High Court in order that the necessary steps may be taken for the disposal thereof on the above footing.

The respondents who have resisted the appeals will pay the costs thereof.

Appeals allowed.

Solicitors for the appellants: *Watkins and Lempriere.*

Solicitors for the respondents: *A. H. Arnould & Son.*

J. V. W.

moving to set aside the service, he waives the objection of want of jurisdiction, and cannot be heard; but a conditional appearance may be entered, which has not the effect of waiving the defendant's right to object to the jurisdiction. In my opinion the case is much the same in the County Court. . . . . I think, therefore, that the objection of the Court may be waived by taking any step in the proceedings before applying to dismiss the action; and this view is borne out by a case which was not cited in argument: *In re Jones* v. *James*(1)."

The remarks of the learned Judges in *Moore* v. *Gamgee*(2) appear to me to apply to a case where leave has been purported to be granted by some persons other than a Judge under clause 12 of the Letters Patent.

In such a case no leave within the meaning of clause 12 has been granted.

The present suit is one where there is no want of jurisdiction in this Court over the subject-matter of the action, but leave under clause 12 of the Letters Patent is required before the Court can entertain the suit.

The defendant in this suit ought to have known as a matter of law that there was a want of jurisdiction unless leave as provided by clause 12 of the Letters Patent had been granted. He has filed his written statement and applied for a commission to examine witnesses. By taking these steps the defendant has, in my opinion, waived his objection to the jurisdiction.

The application by the defendant for a commission to examine witnesses must be set down for argument on its merits.

Attorneys for the plaintiff: *Leslie and Hinds.*
Attorney for the defendant: *Kesteven.*

J. C.

(1) (1850) L. J. (Q. B.) 257. (2) (1890) L. R. 25 Q. B. D. 244.

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Indian Penal Code, but the Court discharged the accused and made over the elephant to the plaintiff. Against that order the accused preferred an appeal to the Sessions Judge, and the learned Judge referred the case to the High Court. The High Court directed that the elephant should be made over to defendant No. 1, and hence the present suit.

The defendants pleaded, *inter alia*, that the elephant was not the plaintiff's tame elephant;' that even if the elephant caught by the defendants were owned by the plaintiff, still the plaintiff having failed to pursue it, the animal became "wild" at the time of its capture by the defendants, and the plaintiff' right in it ceased to exist according to law. It was further pleaded that the plaintiff could not get possession of the animal unless he paid the expenses incurred by defendant No. 1 in capturing the said elephant from the jungle.

The Court of first instance, holding that the plaintiff's ownership of the elephant had ceased to exist before its recapture by the defendant, dismissed the plaintiff's suit. On appeal, the learned District Judge reversed the decision of the first Court and remanded the case.

Against this decision the defendant appealed to the High Court.

Babu Mon Mohan Dutt, for the appellant. The animal in this case is a wild animal by its nature. It strayed away, and the plaintiff lost sight of it and gave up its pursuit. Although the animal was a tame one at one time, it having been in company with wild animals for two or three months, it regained its wildness at the time of its recapture; and, therefore, when the defendant captured it, the plaintiff had lost all right in it. The cases of *Chytun Churn Doss* v. *The Collector of Sylhet*(1), and *Peal* v. *Campbell*(2) support my contention.

No one appeared for the respondent.

STEPHEN AND HOLMWOOD JJ. This is an appeal against the order of the District Judge of the Assam Valley Districts by which he remits the case to the lower Court for that Court to come to a conclusion as to damages.

(1) (1873) 21 W. R. 75. (2) (1878) 3 C. L. R. 515.

opposed to the Calcutta decisions, *Abinash Malakar* v. *Empress* (1) and *Ram Pershad* v. *King-Emperor* (2), which lay down that in determining the fitness of a surety the Magistrate should look to his means, and not his ability or inability to control the action of the party bound down.

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ADAM SHEIKH v. EMPEROR.

No one appeared for the Crown.

RAMPINI AND SHARFUDDIN JJ. This is a Rule calling upon the District Magistrate of Mymensingh to show cause why the order of the Deputy Magistrate declining to accept the sureties offered by the petitioner should not be set aside.

The petitioner has been ordered to furnish security for good behaviour by entering into a bond for Rs 200 with two sureties for Rs. 200 each. The learned Deputy Magistrate has refused to accept the two persons who have offered themselves as sureties, namely, Babon Mandal of Birampur and Solim Sheikh of Chak Bistupur, because, in his opinion, they will not be able to control the petitioner. He has apparently relied on the spirit of two rulings of the Allahabad High Court, *Queen-Empress* v. *Tani*(3) and *Queen-Empress* v. *Rahim Bakhsh*(4)

These are opposed to the rulings of this Court in the cases of *Abinash Malakar* v. *Empress*(1) and *Ram Pershad* v. *King-Emperor*(2). In this latter case it has been held that the question is not whether the surety can supervise the person for whom he stands surety, but whether he is a person of sufficient substance to warrant his being accepted.

We, therefore, make the Rule absolute, and setting aside the order of the Deputy Magistrate, dated the 16th May 1907, we direct that he do consider whether the two sureties named above are of sufficient substance to warrant their being accepted, and dispose of the case accordingly.

Rule absolute.

E. H. M.

(1) (1900) 4 C. W. N. 797

(2) (1902) 6 C. W. N. 593.

(3) (1895) All. W. N. 143.

(4) (1898) I. L. R. 20 All. 206.

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(1) (1873) 21 W. R. 75. (2) (1878) 3 C. L. R. 516.

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BAIJNATH RAM GOENKA v. RAMDHARI CHOWDHRY AND DEO NANDAN PERSHAD v. RAMDHARI CHOWDHRY.

The representatives of the plaintiffs were the appellants to His Majesty in Council.

The principal question raised in these appeals was whether the appellants were entitled to pre-empt a 4-anna share in certain properties sold in 17th December 1897 by Anupbati Koeri, the second respondent in each appeal, to Nirbhoy Chowdhry the first respondent in each of the appeals, now represented by his sons and grandsons.

The original owner of taluqa Rasulpur Bhatowni, the property the sale of which gave rise to the claims for pre-emption now in dispute, was one Maharaj Singh, who on 3rd March 1873 divided the taluqa equally between his two sons Jugal Pershad Singh, and Kamla Pershad Singh who thereon became the owners in possession of an 8-anna share each.

Jugal Pershad Singh in 1884 mortgaged his 8-anna share to Jowhari Lal and Mangniram the appellants. On his death suits for sale of the mortgaged property were brought against his widow, Rajbati Koeri: in those suits decrees were made on 2nd April 1889 in favour of the mortgagees, and in execution of the decrees the said 8-anna share was, on 12th January 1891, purchased by the appellants who thus became owners, and obtained possession, each of a 4-anna share.

On Kamla Pershad Singh's death he left as his heirs two widows, Sundarbati Koeri and Anupbati Koeri the second respondent: each of the widows obtained separate possession of a 4-anna share in the taluqa. On 9th July 1897 Sundarbati Koeri sold her 4-anna share to the appellants. Anupbati on 17th December 1897 sold her 4-anna share to Nirbhoy Chowdhry; and to enforce their right of pre-emption in connection with the last mentioned sale the appellants, on 30th June 1898, instituted the suits out of which the present appeals arose.

The plaints stated the facts as above showing that at the date of the sale the plaintiffs were co-sharers with Anupbati Koeri, and alleged that previous to the plaintiff's purchase from Sundarbati she and her co-widow Anupbati had, in order to pay debts contracted by their husband, borrowed Rs. 63,000 from Madan Mohan Lal and others of Ulao, and had executed a sudhbharna pottah in their favour on 10th January 1883, mortgaging their

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Applying the law, as laid down in these authorities, to the present case, we are of opinion that the wildness of an elephant who has escaped from a life of domestication must in every case depend upon the circumstances. One test of wildness is supplied by Justinian, being followed by subsequent authorities, and this is called *animus revertendi*. If the animal has gone away and may be supposed to be likely to return to a state of captivity, it is obviously not wild But there may be other tests of its wildness, and one is suggested by the case of *Peal* v. *Campbell*(1), and is this, that supposing the animal is recaptured, has it or has it not to be treated like a wild animal? In this case the elephant had apparently been in a state of domestication for a long time, and it appears from the judgment that it resumed its domestic habits on being recaptured. This seems to us to be a conclusive proof that it was not wild and that the property in it had never ceased under the general law relating to wild animals.

There is one other matter which goes a long way in opposition to the conclusion we are asked to adopt, that all elephants are wild, and that is the Act for the Preservation of Wild Elephants, (VI of 1879). This applies to wild elephants and makes it an offence to capture any such elephant. It also repeals certain sections of the Indian Forests Act which applied only to elephants. This makes it obvious that the Act contemplates the existence of tame elephants; and whereas it makes an offence to capture wild elephants it contemplates, and does not affect, the recapture of tame elephants apparently by the original owners.

The result is, that we hold that the elephant in this case was not a wild animal, that the property in him of the plaintiff had not come to an end when he was captured by the Officials of the *mehal*, and that the learned Judge's order to have the case remitted to the lower Court for compensation under section 168 of the Indian Contract Act was a proper and suitable order.

The appeal, therefore, is dismissed. We make no order as to costs.

Appeal dismissed.

S. C. G.

(1) (1878) 3 C. L. R. 515.

The representatives of the plaintiffs were the appellants to His Majesty in Council.

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JOGNESH PROKASH GANGULI v. MANIRADDI.

Babu Brojo Lal Chuckerbutty, for the petitioners. Section 188 of the Bengal Tenancy Act had no application to the facts of the present case. Here the landlords are not joint landlords. They cease to be so inasmuch as they had been realising their rents separately from the tenants under separate Kabuliats. The cases of *Matungini Dassi* v. *Ramdas Mullick* (1) and *Gobind Chandra Pal* v. *Hamidulla Bhuian*(2) support my contention.

Moulvie Syed Shamsul Huda (*Moulvie Nuruddin* with him), for the opposite party. Section 91 of the Bengal Tenancy Act is controlled by section 188 of the said Act. The petitioner being only a joint-landlord is not entitled to maintain an application under section 91 of the Bengal Tenancy Act.

MITRA AND CASPERSZ JJ. This is a Rule calling on the opposite party to show cause why the order passed by the Munsif of Lakshmipur, dated the 17th June, 1907, should not be set aside on the ground that it was illegal.

The petitioners made an application in the lower Court under section 91 of the Bengal Tenancy Act. They were 12 annas landlords and they obtained separate kabuliats from the tenants, the opposite party Nos. 1 to 7, with respect to their share, and they had been realising rents of their share separately from the co-sharer landlord, the opposite party No. 8. They asked for measurement of the land. The Munsif held that section 91 must be read with section 188 of the Bengal Tenancy Act and, reading the two sections together, the petitioners could not ask for measurement of the land, unless the opposite party No. 8 was also a petitioner.

If the petitioners and the opposite party No. 8 were joint landlords in the strict sense of the words, namely, if they gave joint receipts for rents received without any separate contracts of tenancy, the learned Munsif would have been right. But here the case is different. Section 91 only applies to the whole body of landlords, when they are joint landlords. Section 188 has no application when there is a separate contract in favour of one set of landlords. This has been pointed out by this Court in

(1) (1902) 7 C. W. N. 93. (2) (1903) 7 C. W. N. 670.

plaintiffs while refusing to raise their price, said "that if any other purchaser was willing to pay a higher price" Anupbati should sell to him; and that on account of the plaintiff's refusal to purchase her share she sold it to the defendant Nirbhoy Chowdhry for Rs. 44,850.

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Issues were settled on these pleadings of which the following only were now material: (3) When were the plaintiffs aware of the purchase by the defendant Nirbhoy Chowdhry? (4) Whether the ceremonies of *talab-i-mowashibat* and *talab-i-istishad* were duly and legally peformed, and were *bona fide?* (5) Whether the plaintiffs had notice of, and gave consent to, the defendant Anupbati selling the property in suit if she got a higher price than Rs 36,000? (6) Whether the plaintiffs' right of pre-emption had been lost by reason of their gross negligence, and were they estopped from claiming the same? and (7) For what price was the disputed property sold to the defendant, Nirbhoy Chowdhry, and what consideration did he actually pay for the property?

From the judgment of the Subordinate Judge (who delivered one judgment in the two cases) it appeared that the defendant Nirbhoy Chowdhry deposited in Court the amount of the sudhbharna debt on account of the share of his vendor, Anupbati Koeri, and that the plaintiffs withdrew from the Court subsequently to the institution of the suits the amount so deposited and "gave up possession over the disputed property." The Subordinate Judge found that the plaintiff Jowhari Lal was first informed of the sale on the 20th December 1897, and the plaintiff Mangniram on 5th January 1898, and that both the plaintiffs immediately on receipt of the information declared their intention to claim pre-emption, and thus duly carried out the formality of the *talab-i-mowashibad.* He also decided that the other formality of the *talab-i-istishad* had also been duly peformed and without "unreasonable delay or any act of gross negligence" As to this he found that on the evening of 20th December 1897 Jowhari Lal was told in general terms that a sale had been effected on 17th December: he sent a man to his agent at Gopri to verify the fact of the sale and to obtain a copy of the deed of sale if registered. From the 21st to the 26th December 1897 the office of the Registrar was closed for the Christmas holidays. On 27th

PRIVY COUNCIL.

P.C.*
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Jan. 24.

BHAGWAT DAYAL SINGH
v.
DEBI DAYAL SAHU.

[On appeal from the High Court at Fort William in Bengal.]

Champerty and maintenance—Agreement opposed to public policy—Inadequacy of price for property to be recovered by suit—Hindu law—Alienation by widow—Ratification of transactions not carried out by real heir of property—Contract Act (IX of 1872) s. 196—Real owner joining in later transactions—Legal necessity—Portion of consideration of deeds of sale justified by necessity—Form of decree for possession and mesne profits where deeds were held invalid.

There is no law in force in India similar in its effect to the English Law of Champerty and Maintenance, so as to render void an agreement which would, were such English law applicable, be considered champertous.

Ram Coomar Coondoo v. *Chunder Canto Mookerjee*(1); *Kunwar Ram Lal* v. *Nil Kanth*(2); *Achal Ram* v. *Kazim Husain Khan*(3) followed.

An assignment of property said to bel worth three lakhs, by persons claiming to be the next reversioners on the death of a female owner, for a consideration of Rs. 52,600 of which sum Rs. 600 was paid at the time of the execution of the deed, and the balance payable in proportion to the success of a suit by the assignee and assignors to recover the property, for the prosecution of which suit the assignee was to supply the funds, *held* not to be a transaction contrary to public policy and void on that ground by reason of the provision for payment of the purchase money.

Whether it was an unfair and unconscionable bargain by reason of the inadequacy of the price was a question between the assignors and assignee which it was unnecessary to decide in a suit in which the assignors did not repudiate the transaction, but asked that effect be given to it and for that purpose joined the assignee as plaintiff in the suit.

A person who claims title under conveyances from a Hindu female heir with a limited-interest, and who seeks to enforce that title against reversioners is always subject to the burden of proving not only the genuineness of his conveyances, but the full comprehension by the limited owner of the nature of the

* *Present:* LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

(1) (1876) I. L. R. 2 Calc. 233; L. R. 4 I. A. 23.

(2) (1893) L. R. 20 I. A. 112; I. L. R. 20 Calc. 843.

(3) (1905) I. L. R. 27 All. 271; L. R. 32 I. A. 113.

plaintiffs while refusing to raise their price, said "that if any other purchaser was willing to pay a higher price" Anupbati should sell to him; and that on account of the plaintiff's refusal to purchase her share she sold it to the defendant Nirbhoy Chowdhry for Rs. 44,850.

Issues were settled on these pleadings of which the following only were now material: (3) When were the plaintiffs aware of the purchase by the defendant Nirbhoy Chowdhry? (4) Whether the ceremonies of *talab-i-mowashibat* and *talab-i-ishtshad* were duly and legally peformed, and were *bona fide?* (5) Whether the plaintiffs had notice of, and gave consent to, the defendant Anupbati selling the property in suit if she got a higher price than Rs. 36,000? (6) Whether the plaintiffs' right of pre-emption had been lost by reason of their gross negligence, and were they estopped from claiming the same? and (7) For what price was the disputed property sold to the defendant, Nirbhoy Chowdhry, and what consideration did he actually pay for the property?

From the judgment of the Subordinate Judge (who delivered one judgment in the two cases) it appeared that the defendant Nirbhoy Chowdhry deposited in Court the amount of the sudhbharna debt on account of the share of his vendor, Anupbati Koeri, and that the plaintiffs withdrew from the Court subsequently to the institution of the suits the amount so deposited and 'gave up possession over the disputed property." The Subordinate Judge found that the plaintiff Jowhari Lal was first informed of the sale on the 20th December 1897, and the plaintiff Mangniram on 5th January 1898, and that both the plaintiffs immediately on receipt of the information declared their intention to claim pre-emption, and thus duly carried out the formality of the *talab-i-mowashibad.* He also decided that the other formality of the *talab-i-ishtshad* had also been duly peformed and without "unreasonable delay or any act of gross negligence" As to this he found that on the evening of 20th December 1897 Jowhari Lal was told in general terms that a sale had been effected on 17th December: he sent a man to his agent at Gogri to verify the fact of the sale and to obtain a copy of the deed of sale if registered. From the 21st to the 26th December 1897 the office of the Registrar was closed for the Christmas holidays. On 27th

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and maintenance; and whether two deeds of sale executed by certain Hindu ladies were valid and binding on the male reversioners to the estate of the said Narayan Singh the last male owner.

The facts are sufficiently stated in their Lordships' judgment and in the report of the cases before the High Court (RAMPINI and PARGITER JJ.) on appeal, which will be found in I. L. R. 31 Calc. 433.

On this appeal,

Cohen K. C. and *Kenworthy Brown*, for the appellants, contended that the assignment by the second and third appellants to the first appellant was valid and binding, and enabled the assignee to maintain these suits for the recovery of the property in which the right, title and interest of the assignors had been purchased by him. As showing the law of England with respect to champerty and maintenance reference was made to *Bradlaugh* v. *Newdigate*(1), and *Alabaster* v. *Harness*(2). But the English law of champerty and maintenance had been held not to be applicable in India, and there was nothing in the law of India to make the assignment under which the first appellant derived his title illegal or void as being against public policy. Reference was made to *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*(3); *Kunwar Ramlal* v. *Nilkanth*(4); *Achal Ram* v. *Kazim Husain Khan*(5). And even if the assignment be held to be illegal, and the first appellant therefore not entitled to decrees in the suits, the second and third appellants would be entitled to decrees under the prayer in the plaint for general relief: the High Court therefore was wrong in reversing the decree of the Subordinate Judge and dismissing the suits as against them.

It was also contended that the deeds of sale dated 19th January 1887 and 15th May 1891, alienations made by the ladies in possession of the property in dispute after the death of Narayan Singh of whom however only one, his grandmother

(1) (1883) L. R. 11 Q. B. D. 1.
(2) (1894) L. R. 1 Q. B. D. 339, 342.
(3) (1876) I. L. R. 2 Calc. 233, 249, 253; L. R. 4 I. A. 23, 39, 47.
(4) (1893) L. R. 20 I. A. 112, 115; I. L. R. 20 Calc. 843, 846.
(5) (1905) I. L. R. 27 All. 271; L. R. 32 I. A. 113.

sale to the defendant, Nirbhoy Chowdhry, on 20th December 1897 and 5th January 1898 respectively The formalities required for the *talab-i-istishad*, they thought were also duly performed; but they were unable to agree with the Subordinate Judge that,

"They were performed with the necessary promptitude: it is clear that it is absolutely essential that this formal demand of the right of pre-emption should be made with the least practicable delay, and in our opinion it was not so performed. Neither of the plaintiffs went to the defendant's house and performed the *talab-i-istishad* until the 7th January 1898. Now, the plaintiff Jowhari Lal explains that he was engaged during this time in getting a copy of the deed of sale and in making arrangements for a police guard for the conveyance of the money which he tendered to the defendant No. 1 when he performed the *talab-i-istishad*. The plaintiff Magni Ram excuses his delay by saying he was absent in Benares up to the 5th January and that he could not go to the defendant No. 1's house on the 6th January, as he was afraid to go without the protection of the police, and so his agent proceeded there, as soon as he got a police guard, which was when the agent of the plaintiff Jowhari went to the defendant's house. But we do not consider these excuses satisfactory. The evidence discloses the fact that there was considerable and certainly sufficient delay to invalidate the *talab-i-istishad* on the part of both plaintiffs The plaintiff Jowhari Lal instructed his agent Ram Baran Lal to procure a copy of the deed of sale. Ram Baran Lal went to the Registry office at Gogri, where the deed was registered, on the 21st December at 4 o'clock P. M. The office was then closed as it would naturally be, for 4 o'clock P. M. is after office hours. The witness states he went again on the 27th December. The Subordinate Judge observes that this delay was due to the fact that the office at Gogri was closed from the 21st to 26th December. But this was not so. There is no evidence to this effect. We have been referred to a list of the Executive Christmas holidays published by this Court, for the year 1897. From this list it appears that there were executive holidays on the 24th, 25th and 26th December only. There was, therefore, an unnecessary delay of at least three days in making the *talab-i-istishad*, which is fatal. But that is not all. The postal peon, Har Lal Mandar, deposes that he took the envelope containing the copy of the deed of sale to the plaintiff Jowhari Lal on the 2nd January. The Subordinate Judge remarks that this cannot be correct, for the 2nd January 1898 was a Sunday, when registered letters are not delivered. But this does not seem to be a sufficient reason for considering that the peon did not take the letter to the plaintiff Jowhari on the 2nd January. But, even if this conclusion be correct and that the postal peon did not go on the 2nd January, but on the 3rd, there was still delay on the part of the plaintiff, for the peon says he went twice and tendered the letter to the plaintiff and twice the plaintiff refused to take it and told him to take it away and bring it back and he would take it "after thinking over for some time." The plaintiff, according to the peon, only received the letter the third time it was tendered to him, that is, at 4 o'clock P. M. on the 4th January; so that there was clearly at least two days' delay in the receipt by the plaintiff Jowhari of the

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contracts of the nature of champerty and maintenance should be held by the Indian Courts to be invalid, was that they were contrary to public policy. It was against public policy in India, as in England, to allow one person without any interest in the subject of a suit, to make a contract with another to maintain it with funds on the mere chance of its being successful, as in these cases that would be merely a speculative and gambling transaction. Reference was made to *Tara Soonduree Chowdhrain* v. *Collector of Mymensingh*(1), *Achal Ram* v. *Kazim Husain Khan*(2), Stephen's Commentaries 5th Ed Vol. IV, Book VI, Chap. IX, Title 13, "Champerty" page 317; Roman Law, Corpus Juris Civilis, Leipsic Ed. 1865, Vol. I, Book 48, Title X para. 20; Book XLIV, Title VI paras. 1, 2, 3; Book IV, Title XXXV para. 22; Book VIII Titles XXXVI, XXXVII paras. 2 and 4; French law, "Droit Civil Expliqué" by Troplong, 5th Ed. 1856," "De La Vente" Vol. II, page 482, para. 985; and "Dictionaire De Droit" by Legrand, Title "Retrait." Further, it was contended that the bargain was unconscionable on the ground of the inadequacy of the price, and was invalid for that reason.

When the Subordinate Judge found that the assignment to the first appellant was invalid he should not have given decrees to the second and third appellants under the prayer for general relief in the plaint: the granting such decrees was inconsistent with the prayer of the plaint and amounted to an amendment of it: *Cargill & Bower*(3); and Civil Procedure Code (Act XIV of 1882) section 13, Explanations 1 and 2, and section 53 were referred to.

As to the validity of the alienations reference was made to Mayne's Hindu law 6th Ed. pages 827, 829 section 634 as to the obligations of a female heir taking a limited estate in immoveable property; and the evidence was discussed to show that the High Court was right in holding that there was legal necessity for the alienations, and that they were made for adequate consideration: the sale deeds were consequently valid,

(1) (1873) 13 B. L. R. 495; 20 W. R. 446.
(2) (1905) I. L. R. 27 All. 271; L. R. 32 I. A. 113.
(3) (1878) L. R. 10 Ch. D. 502, 508.

Amjad Hossein v. *Kharag Sen Sahu* (1) where it was held that a reasonable time is allowed for reflection; Baillie's Digest of Mahomedan Law pages 489, 507; and Ameer Ali's Mahommedan Law Vol. I, page 598. The appellants did not acquiesce in the sale to Nirbhoy Chowdhury, nor did they do anything to waive their right of pre-emption; the withdrawal of the money deposited in Court by Nirbhoy Chowdhry after the sale was not a recognition of his title but of the fact that he had a right to redeem. The proper amount of consideration was that found by the Subordinate Judge. Though the parties were Hindus they had adopted the custom of pre-emption, and the Bengal Civil Courts Act (XII of 1887) section 37 shows the law to be applied in such cases.

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Jardine, K.C. and *Cowell*, for the respondents, contended that the right of pre-emption had always been kept within narrow limits, and was not meant to be extended. It was a personal right and did not extend to the pre-emptor's heirs. The onus was on the appellants to show that the ceremonies were performed with necessary promptitude and the least practicable delay. Reference was made to Baillie's Digest of Mahomedan Law page 489; Ameer Ali's Mahomedan Law, 2nd Ed., Vol. I, page 596; Sir Roland Wilson's Mahomedan Law, page 331 and page 335, Art. 379. The evidence in these cases showed that delay occurred in the performance of the *talab-i-ishhad*, and the onus on the appellants had therefore not been discharged: *Jumdan* v. *Latif Hossein* (2) was referred to. If the pre-emptor had recognized the purchase in any way he was taken to have acquiesced in it, and waived his right of pre-emption: the right of pre-emption was waived where the pre-emptor has received a benefit by the sale; it was submitted that the application made by the appellants to take out the money deposited in Court by Nirbhoy Chowdhry to redeem the mortgage on the property was a waiver of the right of pre-emption and amounted to a relinquishment of it. Reference was made to *Habibunnissa* v. *Barkat Ali* (3); and Transfer of Property Act (IV of 1882) sections 82, 84.

(1) (1870) 4 B. L. R. (A. C.) 203. (2) (1871) 8 B. L. R. 16; 16 W. R. (F.B.) 11.
(3) (1886) I. L. R. 8 All. 275.

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the whole inheritance. The first of these deeds bore date the 19th January 1887. It purported to be a conveyance by way of sale, by the three ladies who have been mentioned, of the two villages Chiyanki and Ganka to the first respondent. The second deed was dated the 15th May 1891. It purported to be executed by the same three ladies in favour of one Hodges and to convey to him by way of sale the village Lalgara. Hodges afterwards conveyed to the first respondent

The present suits were brought on the 29th August 1898 in the Court of the Subordinate Judge at Ranchi. The plaintiffs were the first appellants and the two persons from whom he purchased. The sole defendant in one suit and the substantial defendant in the other was the first respondent. The first suit related to the village Lalgara, the second suit to the villages Chiyanki and Ganka. The claim in each case was for possession and mesne profits.

The first question raised in the case and argued on the appeals was whether or not the sale by the second and third appellants to the first appellant was void in law, so as to pass no title, on the ground that it was champertous, or contrary to public policy.

For the respondents it was boldly argued that, although the English law as to maintenance and champerty is not, as such, applicable to India, yet on other grounds what is substantially the same law is there in force. Their Lordships are of opinion that that proposition cannot be supported. In three cases before this Board [*Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*(1), *Kunwar Ram Lal* v. *Nil Kanth*(2), *Achal Ram* v. *Kazim Husain Khan*(3)] a contrary doctrine has been laid down. In the last of those cases full effect was given, under circumstances closely analogous to those of the present case, to an agreement which would certainly have been void if champerty avoided transactions in India.

It was further argued that the transactions in question was contrary to public policy and void on that ground by reason of

(1) (1876) I. L. R. 2 Calc. 233; L. R. 4 I. A. 23.

(2) (1893) L. R. 20 I. A. 112; I. L. R. 20 Calc. 843.

(3) (1905) I. L. R. 27 All. 271; L. R. 32 I. A. 113.

peon. This conclusion is based upon the evidence of the peon himself, which the learned Judges believed. But the Judge who had this witness before him disbelieved his story. The story is admittedly inconsistent with the rules of the Post Office; and it finds no support from the witness's own endorsement made at the time. Their Lordships think that the Subordinate Judge was right in rejecting that story, and therefore the second allegation of delay fails.

The more serious case of delay is said to have occurred subsequently, and with respect to it the position of Mangni and Jowhari is identical. On the 5th January they knew everything which it was essential to know. On that day they took the advice of a local barrister, and in accordance with his advice they on the next day, the 6th January, applied to the proper officer for a police guard to protect the messengers and the money, which it was proposed those messengers should tender. This guard they obtained on the 7th, and messengers started. On that day those messengers made the claim (and, as has been found, with due formalities) at the house of Nirbhoy, the purchaser. On subsequent days the claim was renewed at the house of the vendor, and upon the land The question that arises is, whether the interval that elapsed between the 5th January and the 7th January is a fatal delay. The Subordinate Judge held that it was not; the High Court held that it was

There is no question of law in the case. It is clear that the right of pre-emption must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude, and that any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such delay is a question to be determined upon the facts of each particular case. It is enough for their Lordships to say that, in their opinion, the grounds stated by the learned Judges of the High Court for overruling the decision of the first Court, on a pure question of fact, were insufficient.

Another point argued on behalf of the respondents arises in this way:—The two plaintiffs Mangni and Jowhari had obtained a transfer of a zerpeshgi mortgage binding the four annas share sold by Anupbati to Nirbhoy. After that sale Nirbhoy paid the

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Before dealing further with this question, it must be noticed that the case now contended for is not the case raised on the pleadings and relied upon at the trial. The respondent in his written statement alleged a title derived, not from Jileb Koer, but from Etraj Koer. He said, in paragraph 21, that "Etraj Koer was no heir to Narayan Saran Singh, and that she acquired an absolute right by adverse possession;" in paragraph 23 "that it is not true, as the plaintiffs allege, . . . that on the death of Narayan Saran Singh, Jileb Koer succeeded as heir and was in possession up to her death; the fact is '. . . that Etraj Koer alone was in such possession until her death," and in paragraph 25 that "Jileb Koer and Aprup Koer never took the estate of Narayan Saran Singh as heir, and the fact of their joining in the documents as persons executing the deeds of sale and the prior deeds was a matter of form of evidence of members dependent for maintenance on Etraj Koer, and was merely a surplusage'; and it was added in paragraph 26 that "even if Jileb Koer were to have taken the estate . . . by inheritance, she would take it in absolute state . . . under the provisions of Mitakshara law, and so also if she was made a co-sharer by Etraj Koer in Etraj Koer's right." In his evidence given at the trial the respondent endeavoured to maintain the case that his title was derived from Etraj Koer and was good on that account.

One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making, and also that that alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take from a limited owner but from one whose title he alleges to have been adverse to that owner.

These considerations apply with special force to the present case. The earlier transactions of the first respondent were with

APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

MAHADAR MOHANTA
v.
BALARAM GAGOI.*

1908
Feb. 17

Wild animals—Elephant—Animals feræ naturæ—Right of property—Animus revertendi—Recapture.

When a wild animal has escaped from captivity and pursuit of it has been given up, the property which a man may formerly have had in it ceases, and it becomes open to any one else to reduce the animal to his possession, and when it will, for the time, become his property.

An animal which has gone away and may be supposed to be likely to return to a state of captivity, is not a 'wild animal'.

Where an elephant, which had apparently been in a state of domestication for a long time, disappeared from the jungle where it regularly grazed but resumed its domestic habits on being recaptured:—

Held, that the elephant was not a 'wild animal,' and that the property in it never ceased with the original owner.

Chytun Churn Doss v. *The Collector of Sylhet*(1), and *Peal* v. *Campbell*(2) referred to.

SECOND APPEAL by Mahadar Mohanta, the defendant No. 2.

This appeal arose out of a suit brought by the plaintiff to recover possession of an elephant valued at Rs. 2,500.

The plaintiff alleged that the elephant was a tame one and belonged to him for 20 years. The animal was regularly turned into the jungle to graze, with its legs hobbled. It disappeared from the jungle on the 11th September, 1903. The plaintiff went on pursuing it, but failed to recapture the animal.

In January 1904, it was caught in a stockade by the defendants who were lessees of an elephant-catching *mahal* from the Government.

The plaintiff asked the defendants to give back the elephant to him, but they refused to part with the animal. He then brought an action against the defendants under section 403 of the

* Appeal from an order of remand, No. 86 of 1907, against an order of W. B. Brown, Judge, Assam Valley Districts, dated Nov. 2[illegible], 1906.

(1) (1873) 21 W. R. 75.
(2) (1878) 3 C. L. R. 415.

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There remains one other point for consideration. The plaintiffs claimed not only possession but mesne profits. The Subordinate Judge rejected the latter claim. Their Lordships are of opinion that, as the deeds of sale are not good as such, the claim for mesne profits is well founded. In argument it was conceded that on the other side of the account interest at 6 per cent. should be allowed on the sums credited to the first respondent. The amounts thus to be allowed on the one side and on the other can be adjusted in execution proceedings.

Their Lordships will humbly advise His Majesty that the appeals should be allowed, that the decrees of the High Court should be discharged with costs to be paid as regards the first decree by the present respondents other than Sowton and as regards the second decree by the first respondent, that the decrees of the Court of the Subordinate Judge should be discharged, and that instead thereof it should be ordered that upon the first appellant paying to the first respondent the sums found in favour of the latter by the Subordinate Judge with interest at 6 per cent. per annum the first appellant do recover possession of the property in suit together with mesne profits to be ascertained in execution proceedings and cost to be paid by the First Party defendants in the first suit and by the sole defendant in the second suit.

The respondents other than Sowton will pay the costs of these appeals.

Appeals allowed.

Solicitors for the appellants: *Withall and Withall.*

Solicitors for the respondents (except Sowton): *T. L. Wilson & Co.*

J. V. W.

The question at issue is whether the plaintiff is entitled to an elephant who strayed from him in the month of September 1903, and who was captured by the servants of the Government *mehal* in the ensuing January. It is sought to withstand his claim on the ground that the elephant at the time of his capture was a wild animal in whom the plaintiff had lost all rights of property. There is no doubt that the law of this country as derived from the Institutes of Justinian and as recognised in England is that, when a wild animal has escaped from captivity and pursuit of him has been given up, the property which a man formerly may have had in him ceases, and it becomes open to any one else to reduce the animal to his possession, when it will for the time become his property.

The question we have to decide is whether the elephant in this case was a wild animal. Now it is contended on behalf of the defendant that all elephants are from the nature of the case wild animals, because we may take it as a general rule that all elephants are born in a state of wildness. Two authorities have been quoted to us to support this contention. One is the case of *Chytun Churn Doss* v. *The Collector of Sylhet*(1), where a passage in Stephen's Commentary reproducing the law as laid down by Justinian is applied to the case of an elephant who had escaped from the control of his master. This part of the judgment is entirely *obiter*, as the case was decided against the plaintiff on the question of identity, and the point of law raised was not entirely answered by the part of the judgment to which we have referred.

The question again came before this Court in the case of *Peal* v. *Campbell*(2), where the elephant escaped from his former master and was captured by some one else. The case there was decreed in favour of the defendant. The facts as stated in the judgment of the Court are that the animal in question escaped from the master's premises or from the place where it had been left to graze in company with other elephants which were wild, and not merely did not return to its master but kept aloof from any habitation of man and resumed unmistakably the wild habits which had been familiar to it before its capture; and after recapture had to be treated precisely in the same manner as other wild elephants.

(1) (1873) 21 W. R. 75. (2) (1879) 5 C. L. R. 211.

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the other properties. The judgment-debtors appealed to the High Court.

Babu Dwarka Nath Mitra, for the appellant. A decree-holder in executing the order for payment of costs in a mortgage decree cannot proceed against properties other than those mortgaged without selling the latter in the first instance. In a mortgage decree a general account should be taken once for all of the principal, interest, and costs due on a date to be fixed: *Sundar Koer* v *Rai Sham Krishen*(1). The two cases, *Rutnessur Sein* v. *Jusoda*(2) and *Damodar Das* v. *Budh Kuar*(3), relied on by the lower Court relate to decrees in foreclosure suits and are distinguishable from the present suit which is one for sale. I am supported in my contention by a Full Bench ruling of the Allahabad High Court, *Maqbul Fatima* v. *Lalta Prasad*(4). See also Dr. Ghose's Mortgage, page 901.

Babu Harendra Krishna Mookerjee, for the respondent. All mortgage decrees should be treated alike; no distinction should be made between a foreclosure decree and a decree for sale. The two cases relied upon by the lower Court are therefore applicable: see also *Pran Kuar* v. *Durga Prasad*(5).

GEIDT AND CHITTY JJ. The only question we have to decide is whether a decree-holder in executing a mortgage decree can, for the purpose of recovering the costs awarded by the decree, put up to sale properties other than the mortgaged property. The Subordinate Judge has held that he can, and in support of his view has referred to two cases. *Rutnessur Sein* v. *Jusoda*(2) and *Damodar Das* v. *Budh Kuar*(3). These, however, were not cases where the decrees had been for sale of the mortgaged properties. They were decrees passed for foreclosure where the mortgage had been by way of conditional sale. The present case is similar to *Maqbul Fatima* v. *Lalta Prasad*(4), decided by the Allahabad High Court, where it was held that the costs were really part of the

(1) (1906) I. L. R. 34 Calc. 150.
(2) (1886) I. L. R. 14 Calc. 185.
(3) (1888) I. L. R. 10 All. 179.
(4) (1898) I. L. R. 20 All. 523.
(5) (1887) I. L. R. 10 All. 127.

The question at issue is whether the plaintiff is entitled to an elephant who strayed from him in the month of September 1903, and who was captured by the servants of the Government *mehal* in the ensuing January. It is sought to withstand his claim on the ground that the elephant at the time of his capture was a wild animal in whom the plaintiff had lost all rights of property. There is no doubt that the law of this country as derived from the Institutes of Justinian and as recognised in England is that, when a wild animal has escaped from captivity and pursuit of him has been given up, the property which a man formerly may have had in him ceases, and it becomes open to any one else to reduce the animal to his possession, when it will for the time become his property.

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(1) (1873) 21 W. R. 75. (2) (1879) 5 C. L. R. 212.

CIVIL RULE.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

JOGNESH PROKASH GANGULI

v.

MANIRADDI.*

1908 Jan. 2.

Bengal Tenancy Act (VIII of 1885) ss. 91, 188—Application for measurement by a landlord who is realising his rent separately, whether maintainable—Joint owner—Joint landlord.

Held, that if one set of landlords obtains separate kabuliats entering into separate contracts for rent with the tenants such landlords cease to be joint landlords with the other co-proprietors of the land They become joint owners and not joint landlords.

Matangini Dassi v. *Ramdas Mullick*(1) and *Gobind Chandra Pal* v. *Hamidulla Bhuian*(2) referred to.

Held, further, that such a landlord is entitled to make an application for measurement of the land comprised in his estate under section 91 of the Bengal Tenancy Act.

RULE granted to the petitioners, Jognesh Prokash Ganguli and others, under section 622 of the Civil Procedure Code

The petitioners, who were the owners of twelve annas share of a property, made an application to the Court of the Munsif at Lakshmipur, under section 91 of the Bengal Tenancy Act, for measurement of the land of the tenant It appeared that they obtained separate kabuliats from the tenants, the opposite party Nos. 1 to 7, and they had been realising rents of their share separately. The opposite party, No 8 who was the other co-sharer landlord, had also been realising his share of the rent separately from the tenants The learned Munsif held that regard being had to the provisions of section 188 of the Bengal Tenancy Act, the application of the petitioners under section 91 of the said Act was not maintainable. Against this order the petitioners moved the High Court and obtained this Rule.

* Civil Rule No. 2119 of 1907.

(1) (1902) 7 C. W. N. 93. (2) (1903) 7 C. W. N. 674.

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BY

J. O'KINEALY

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AND

SIR ROBERT RAMPINI, K.T, M. A., LL. D.,

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1908

Joogesh Prokash Gangoli v. Mantradhi.

various cases. We need only refer to the cases of *Matungini Dassi* v *Ramdas Mullick*(1) and *Gobind Chandra Pal* v. *Hamidulla Bhuian*(2). These are ample authorities for the proposition that, if one set of landlords obtains separate kabuliat entering into separate contract for rent with the tenant, such landlord ceases to be a joint landlord with the other co-proprietors of the land. He becomes a joint owner and not a joint landlord. That is the distinction which should be kept in mind in deciding cases like the present which would otherwise be covered by section 188. We accordingly set aside the order of the Munsif and direct him to proceed according to law in the matter before him, and deal with any other points that may arise in the case. The opposite party must pay to the petitioners the cost of this hearing.

Rule absolute.

S. C. G.

(1) (1902) 7 C. W. N. 93. (2) (1903) 7 C. W. N. 670.

alienations she was making, and also that those alienations were justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner.

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BHAGWAT DAYAL SINGH
v.
DEBI DAYAL SAHU.

The defendant's title to the property in suit depended on alienation made in his favour by one of three Hindu ladies, who was not the heir of the last male owner, and on two subsequent deeds of sale, which it was sought to set aside in this suit, in which the real owner had joined:—

Held, with reference to the earlier transactions, that the onus on the defendant had not been discharged, and that there was no satisfactory evidence that they had been authorized in any way by the real owner.

Nor could she ratify them under section 196 of the Contract Act (IX of 1872) by becoming a party to the later transactions, it would be a serious extension of the law, as hitherto applied, to hold that a woman with a limited interest could by acts *ex post facto* charge upon the estate which she represents obligations not originally binding upon it.

Though the deeds of sale were therefore invalid, the consideration being for the most part not justified by legal necessity, yet as to certain sums in both deeds as to which such necessity was established it was held that the first Court had rightly made the decree for possession conditional on the payment by the plaintiff of such sums to the defendant.

As the deeds were void, as such, the claim for mesne profits was well founded.

Two consolidated appeals from one judgment and two decrees (20th July 1903) of the High Court at Calcutta, which modified a judgment and two decrees (20th December 1899) of the Court of the Subordinate Judge of Ranchi.

The plaintiffs were the appellants to His Majesty in Council.

The suits out of which the appeals arose were brought to recover certain immoveable property to which the second and third plaintiffs-appellants alleged they were entitled as the next reversionary heirs of one Narayan Singh; and on 29th November 1895 they had executed, in favour of the first plaintiff-appellant, a deed by which they sold to him the whole of their right title and interest in the estate of Narayan Singh. The consideration was Rs. 52,600, of which sum Rs. [illegible] were paid to the vendors, the balance being only payable in the event of the vendor's success in recovering the property by suit.

The main questions raised on these appeals were whether the suits were not maintainable on the ground of champerty

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Jileb Koer was his heir, were void as having been executed by them without any independent advice, without adequate consideration, and because the evidence did not show that there was sufficient legal necessity to justify the alienations, or that the vendees made due inquiries as to the existence of such necessity, or had the *bonâ fide* belief that any such necessity existed. The onus of proof lay on the respondent. Reference was made to *Collector of Masulipatam* v. *Cavaly Vencata Narainapah*(1), *Amarnath Sah* v. *Achhan Kuar*(2), *Kameswar Pershad* v. *Run Bahadur Singh*(3), *Sham Sundar Lal* v. *Achhan Kunwar*(4), *Tika Ram* v. *Deputy Commissioner of Barabanki*(5), and *Deputy Commissioner of Kheri* v. *Khanjan Singh*(6). As to the sale deeds the Subordinate Judge had made proper decrees so far as the second and third appellants were concerned, in giving them decrees for recovery of the property in suit conditional on their paying to the first respondent certain sums advanced which were justified by legal necessity. The Subordinate Judge however had dismissed the suits so far as the first appellant was concerned on the ground that the assignment to him by the other appellants was void. It was submitted that the assignment was valid and therefore the decrees should be in favour of the first appellant for possession of the property in suit with mesne profits, and with, if thought desirable, the same conditions as to the payments to the first respondent as the Subordinate Judge had imposed, his decrees having been wrongly reversed by the High Court.

Sir R. Finlay K.C. and *DeGruyther*, for the respondents, contended that although the English law of champerty and maintenance was not in force in India yet there existed principles in the Indian law which were very similar in effect to that law. In the case of *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*(7), it was said that the ground on which

(1) (1861) 8 Moo. I. A. 529.

(2) (1892) I. L. R. 14 All. 420, 429; L. R. 19 I. A. 196, 202.

(3) (1880) I. L. R. 6 Calc. 843, L. R. 8 I. A. 8.

(4) (1898) I. L. R. 21 All. 71, 81, L. R. 25 I. A. 183, 191.

(5) (1899) I. L. R. 26 Calc. 707, 711; L. R. 26 I. A. 97, 99.

(6) (1907) I. L. R. 29 All. 331; L. R. 34 I. A. 72.

(7) (1876) I. L. R. 2 Calc. 233, L. R. 4 I. A. 23.

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it was submitted, as against the reversioners, the second and third appellants.

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BHAGWAT DAYAL SINGH v. DEBI DAYAL SAHU.

Cohen K.C., in reply, as to the assignment, referred to *Hutley* v. *Hutley*(1) and to the "Principles of German Civil Law" by E. J. Schuster, Ed. 1907, page 119, para 120; *Tarachand* v. *Suklal*(2); Contract Act (IX of 1872), section 30; and Civil Procedure Code, section 13· and with regard to the alienations, *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*(3).

The judgment of their Lordships was delivered by

Jan. 24.

SIR ARTHUR WILSON. These consolidated appeals relate to three villages, Chiyanki, Ganka, and Lalgara, and the substantial conflict is between the first appellant and the first respondent.

The villages with others were formerly the property of Ram Saran Singh, who on his death was succeeded by his infant son Narayan Narayan died, while still an infant and unmarried, on the 7th August 1879, and left surviving him his grandmother Jileb Koer, an aunt Aprup Koer, widow of Ram Saran's brother, and a stepmother Etraj Koer, widow of Ram Saran. Of these, the grandmother was heir to the boy's property with the limited interest of a Hindu female inheriting from a male. The three ladies appear to have lived together down to the death of the grandmother, which took place on the 22nd November 1894.

On the death of the grandmother, the inheritance again opened, and the second and third appellants, Bhanpertap Singh and Kirpa Narayan Singh, were then the nearest male heirs of the deceased boy. Those two persons, on the 29th November 1895, purported to sell the three villages in question to Rajah Bhagwat Dayal Singh, the first appellant. And that is the title under which he claims.

The first respondent, on the other hand, as the case is now put on his behalf, claims under two sale deeds executed, as it is now said, by or on behalf of the grandmother, Jileb Koer, the sales being, it is contended, justified by necessity so as to pass

(1) (1878) L. R. 8 Q. B. 112. (2) (1888) I. L. R. 12 Bom. 559.
(3) (1869) 13 Moo I. A. 209.

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the provision as to payment of the purchase money by the first appellant to the second and third. The purchase money was fixed at Rs 52,600, of which Rs. 600 was to be paid down, and the balance when the property should be recovered. Their Lordships are unable to agree to this argument. In their opinion the condition so introduced does not carry the case any further than does the champertous character of the transaction generally.

It was further said, and this was relied upon in the Courts in India, that the transaction was an unfair and unconscionable bargain for an inadequate price. But that is a question between assignor and assignee It is unnecessary to consider what the decision ought to have been if this had been a litigation between the assignors and the assignee in which the former sought to repudiate the assignment. In the present case the assignors do nothing of the kind. They maintain the transaction and ask that effect be given to it, and for that purpose they join as plaintiffs in the present actions. Their Lordships are therefore of opinion that the attack upon the title of the first appellant upon any such grounds as those indicated must fail.

The second question that has to be considered is whether the respondent has shown a good title in himself by purchase from Jileb Koer, the grandmother, under the two sale deeds mentioned, and under such circumstances as to make that title effectual against the reversionary heirs.

The Subordinate Judge, who tried the cases, held that the conveyances were not good, but he allowed, in favour of the first respondent, certain sums which he considered to have been advanced for purposes of legal necessity; and whilst giving a decree to the appellants and plaintiffs for possession of the property, he made that decree conditional upon the payment to that respondent of the sums held to have been advanced for legitimate necessities. On the argument of these appeals, Mr. Cohen, for the appellants, accepted the propriety of this mode of dealing with the case, and assented to the allowance so made by the Subordinate Judge.

The High Court, on appeal, differed from the first Court, and held that the necessity for the sales in question was established.

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Etraj Koer, and there is no satisfactory evidence to show that Jileb Koer, the real owner, took part in them, or authorised them in any way.

It was argued, however, that if Jileb Koer was not shown to have authorised the earlier transactions, she had ratified them by being a party to the later documents and particularly the two sale deeds. Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. And this rule is recognised in section 196 of the Indian Contract Act. Looking to the substance of the matter, it would be a serious extension of the law, as hitherto applied, to hold that a woman with a limited interest could, by acts *ex post facto*, charge upon the estate which she represents obligations not originally binding upon it.

With regard to the first of the sale deeds now in question, when the details which make up the consideration come to be examined, it appears that they include one sum of Rs. 1,500 which the Subordinate Judge credited to the first respondent in the manner already explained. Apart from this sum the great bulk of the consideration for this sale deed consists of debts originally incurred by Etraj Koer with accretions of interest and compound interest. Their Lordships are of opinion that this deed was correctly estimated by the Subordinate Judge.

The case as to the second sale-deed is not quite so simple. With regard to it the Subordinate Judge gave credit to the first respondent for considerable sums as having been advanced for real necessities. As to the rest of the consideration for that deed he held that necessity had not been established. In coming to this conclusion, he took into account not only the more general considerations already referred to, but also certain circumstances peculiar to the case—that the lady who alone had any power to convey was old, and had no independent advice to guide her, and that the first respondent was in a position to exercise considerable influence over her affairs. Their Lordships think the Subordinate Judge was justified in taking all these matters into his consideration; and they see no sufficient ground for rejecting his conclusions.

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APPELLATE CIVIL.

Before Mr. Justice Geidt and Mr. Justice Chitty.

RAJ KUMAR SINGH

1909
Jan. 31.

v.

SHEO NARAYAN SAHU.*

Costs—Mortgage decree—Execution of decree for costs—Mortgaged properties—Transfer of Property Act (IV of 1882) s. 90.

A decree-holder in executing a mortgage decree must, for the purpose of recovering the costs awarded by the decree, proceed in the first instance against the property mortgaged; and in the event of the same being found insufficient he can proceed against properties other than the mortgaged property. The order for costs is a part of the mortgage decree.

Rutnessur Sein v. Jusoda(1) and *Damodar Das v. Budh Kuar*(2) distinguished.

Maqbul Fatima v. Lalta Prasad(3) followed.

Appeal by Raj Kumar Singh and others, judgment-debtors.

The plaintiff obtained a mortgage decree against the defendants, but not for the full amount claimed in the Court of the Subordinate Judge of Saran; he appealed to the High Court against that portion of the decree which was not in his favour. The High Court modified the decree of the lower Court and ordered the defendants, amongst other things, to pay the plaintiff the sum of Rs. 503 for his costs. The plaintiff proceeded to execute the decree for costs, and applied for the sale of some properties of the defendants other than the properties mortgaged for the purpose of realizing the said costs.

The defendants, judgment-debtors, made an objection on the ground that the decree for costs could not be executed against them personally or their properties other than those mortgaged without, in the first instance, selling the latter. The lower Court negatived the objection and allowed the plaintiff to proceed against

* Appeal from original order, No. 530 of 1906, against the order of Sarada Prasad Bose, Subordinate Judge of Chapra, dated Aug. 18, 1906.

(1) (1886) I. L. R. 14 Calc 185. (2) (1888) I. L. R. 10 All 179.
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amount for which the mortgaged property had been ordered to be sold. We are clearly of opinion that the decree for costs is a part of the mortgage decree, and that the decree-holder must proceed in the first instance against the property mortgaged. It is only in the event of the mortgaged property being found insufficient to satisfy the mortgage decree that a decree-holder can proceed against the other properties in the manner provided by section 90 of the Transfer of Property Act.

1908

RAJ KUMAR SINGH v. SHEO NARAYAN SAHU

In this view of the case we allow the appeal and set aside the order of the Subordinate Judge, allowing the decree-holder to proceed against properties other than the mortgaged properties.

The appellants are entitled to their costs from the respondents.

Appeal allowed.

S. C. B.

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Regulations made under the Statute 33 Vict., Cap. 3, from 1905 up to date.
The above may be obtained separately. The price is noted on each]

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Act	Language	Rs	A	P	
Act XV of 1856 (Hindu Widow's Re-marriage)	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act III of 1867 (Gambling), as modified up to 1st January, 1905	In Urdu ...	0	1	0	[1a.]
Act XVI of 1873 (Village and Road Police, United Provinces)	In Urdu ...	0	1	0	[1a.]
Act IX of 1874 (European Vagrancy)	In Urdu ...	0	2	0	[1a.]
Act XI of 1876 (Presidency Banks), as modified up to 1st March, 1906	In Urdu ..	0	3	9	[1a. 6p.]
	In Nagri ...	0	3	6	[1a. 6p.]
Act XVIII of 1786 (Oudh Laws) ...	In Urdu ...	0	2	0	[1a]
Act I of 1878 (Opium), as modified up to 1st October, 1907	In Urdu ...	0	1	6	[1a]
Act VII of 1889 (Succession Certificate) as modified up to 1st December, 1903 ...	In Urdu ..	0	1	9	[1a.]
Act XIII of 1889 (Cantonments), as modified up to 1st October, 1907	In Urdu ...	0	3	0	[1a. 6p.]
ct XII of 1896 (Excise), as modified up to 1st March, 1907	In Urdu ...	0	2	9	[2a.]
	In Nagri .	0	3	3	[2a.]
ct XIII of 1899 (Glanders and Farcy), as modified up to 1st February, 1908 .	In Urdu .	0	0	9	[1a]
	In Nagri .	0	0	9	[1a.]
Act I of 1906 [Indian Tariff (Amendment)] ..	In Urdu ..	0	0	3	[1a.]
	In Nagri ..	0	0	3	[1a.]
Act III of 1906 (Coinage)	In Urdu ..	0	0	9	[1a.]
	In Nagri ..	0	0	1	[1a]
Act III of 1907 (Provincial Insolvency) ..	In Urdu ..	0	1	6	[1a]
	In Nagri ..	0	1	6	[1a.]
Act IV of 1907 [Repealing and Amending (Rates and Cesses)	In Urdu ...	0	0	3	[1a.]
	In Nagri ..	0	0	3	[1a]
Act V of 1907 (Local Authorities Loan) ...	In Urdu ..	0	0	3	[1a]
	In Hindi .	0	0	3	[1a]
Act VI of 1907 (Prevention of Seditious Meetings)	In Urdu ..	0	0	3	[1a.]
	In Hindi ...	0	0	3	[1a]
Act I of 1908 (Legal Practitioners) ...	In Urdu ..	0	0	3	[1a.]
	In Hindi ..	0	0	3	[1a.]
Act II of 1908 (Tariff)	In Urdu ...	0	0	3	[1
Act IV of 1908 (Explosives Substances) ...	In Urdu ...	0	3	0	[1a]
Act VII of 1908 (Prevention of Excitement to murder in Newspapers)	In Urdu ..	0	0	3	[1a.]
	In Hindi ..	0	0	3	[1a]



☞ *The amounts within crotchets are for packing and postage*

LIST OF BOOKS AND PUBLICATIONS FOR SALE

WHICH ARE

MORE THAN TWO YEARS OLD.

LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the Office of the Superintendent of Government Printing, India, No. 8, Hastings Street, Calcutta]

THE PRICES OF THE GENERAL ACTS, LOCAL CODES, MERCHANT SHIPPING DIGEST AND INDEX TO ENACTMENTS HAVE BEEN CONSIDERABLY REDUCED.

I.—THE INDIAN STATUTE-BOOK.

REVISED EDITION.

Super-royal 8vo cloth lettered.

A.—STATUTES

	Rs.	A.	P.	
A [illegible] India Volume I, containing [illegible] Edition 1899	6	0	0	[10a.]
A [illegible] India Volume II, containing [illegible] Edition 1900	8	0	0	[10a.]

B.—GENERAL ACTS.

	Rs.	A.	P.	
General Acts of the Governor-General of India in Council, Vol. I, from 1834 to 1867 Edition 1898 . . .	7	0	0	[10a.]
General Acts of the Governor-General of India in Council, Vol. II, from 1868 to 1876. Edition 1898	5	0	0	[10a.]
General Acts of the Governor-General of India in Council, Vol. III, from 1877 to 1881. Edition 1898	5	0	0	[9a.]
General Acts of the Governor-General of India in Council, Vol. IV, from 1882 to 1884. Edition 1898	7	0	0	[10a.]
General Acts of the Governor-General of India in Council, Vol. V, from 1885 to 1890. Edition 1898 . ..	5	0	0	[9a.]
General Acts of the Governor-General of India in Council, Vol. VI, from 1891 to 1898. Edition 1898	7	0	0	[10a.]
General Acts of the Governor-General of India in Council, Vol. VII, from 1899 to 1903, inclusive, Edition 1904 ...	3	0	0	[6a.]

C.—LOCAL CODES.

	Rs.	A.	P.	
The Ajmere Code, Third Edition, 1905, containing the Enactments in [illegible] Appendix consisting of a [illegible] been declared in force in [illegible] by notification under the [illegible] Chronological Table and an Index	2	8	0	[7a.]



	Rs.	A.	P.	
Act I of 1859 (Merchant Shipping), as modified up to 30th June, 1905 ...	0	13	0	[2a.]
Act XI of 1859 (Bengal Land Revenue Sales), as modified up to 1st August, 1906 ...	0	4	0	[1a.]
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874 ...	0	1	6	[1a.]
Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December, 1904 ...	0	1	6	[1a.]
Act XXI of 1860 (Societies Registration), as modified up to 1st December, 1904 ...	0	2	0	[1a.]
Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903, with an Index ...	2	8	0	[5a.]
Act V of 1861 (Police), as modified up to 7th March, 1903 ...	0	7	6	[1a. 6p.]
Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898 ...	0	3	6	[1a.]
Act XXIII of 1863 (Claims to Waste-lands), as modified up to 1st December, 1896 ...	0	4	0	[1a.]
Act III of 1864 (Foreigners), as modified up to 1st September, 1906 ...	0	3	6	[1a.]
Act VI of 1864 (Whipping), as modified up to 1st August, 1905 ...	0	3	6	[1a.]
Act XVII of 1864 (Official Trustees,) as modified up to 1st July 1890 ...	0	5	6	[1a.]
Act III of 1865 (Carriers), as modified up to 31st May, 1903 ...	0	3	0	[1a.]
Act X of 1865 (Succession), as modified up to 1st July, 1890 ...	1	8	0	[2a.]
Act III of 1867 (Gambling), as modified up to 1st January, 1905...	0	4	0	[1a.]
Act V of 1869 (Indian Articles of War), as modified up to 1st December, 1904 ...	1	2	0	[3a.]
Act XX of 1869 (Volunteers), as modified up to 1st May, 1896 ...	0	4	0	[1a.]
Act of 1871 (Cattle Trespass), as modified up to 1st May, 1906 ...	0	6	0	[1a.]
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904 ...	0	7	0	[1a.]
Act XV of 1872 (Christian Marriage), as modified up to 1st December, 1904 ...	0	10	0	[2a.]
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903 ...	0	3	6	[1a.]
Act X of 1873 (Oaths), as modified up to 1st February, 1903 ...	0	3	9	[1a.]
Act II of 1874 (Administrator General), as modified up to 1st July, 1890; with a list of Native States included within the Presidencies of Bengal, Madras and Bombay, respectively, for the purposes of the Act ...	0	11	0	[2a.]
Act IX of 1874 (European Vagrancy), as modified up to 1st December, 1901 ...	0	6	6	[1a.]
Act XIV of 1874 (Scheduled Districts), as modified up to 1st October, 1895 ...	0	6	0	[1a.]
Act XV of 1874 (Laws Local Extent), as modified up to 1st October, 1895 ...	0	7	0	[1a.]
Act IX of 1875 (Indain Majority), as modified up to 1st May, 1906 ...	0	2	0	[1a.]
Act of 1877 (Specific Relief), as modified up to 1st February 1904	0	11	0	[1a. 6p.]

	Rs.	A.	P.	
Act VI of 1886 (Births, Marriages and Death Registration), as modified up to 1st June, 1891	0	6	0	[1a.]
Act XI of 1886 (Tramways) as modified up to 1st December, 1903	0	9	0	[2a.]
Act XIII of 1886 (Securities), as amended by Act XII of 1891	0	2	9	[1a.]
Act VII of 1887 (Suits Valuation), as modified up to 1st October, 1904	0	1	9	[1a.]
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1900	0	6	0	[1a.]
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899	0	8	0	[1a.]
Act V of 1888 (Inventions and Designs), as modified up to 1st July, 1903	0	9	0	[2a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	0	1	9	[1a.]
Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903	0	5	6	[1a.]
Act X of 1889 (Ports), as modified up to 1st April, 1901 ...	0	11	0	[2a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1859	0	7	0	[1a.]
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904	0	3	0	[1a.]
Act IX of 1890 (Railways), as modified up to 1st June 1905 with an Index	1	2	0	[2a.]
Act X of 1890 (Press and Registration of Books), as modified up to 1st December, 1903	0	2	3	[1a.]
Act XII of 1891 (Repealing and Amending Act), shewing the Schedules as modified up to 31st May 1902	0	12	0	[1a. 6p.]
Act XIV of 1891 (Oudh Courts), *as amended* by the Oudh Courts Act (1891) Amendment Act, 1897	0	1	3	[1a.]
Act I of 1894 (Land Acquisition), with footnotes	0	7	0	[1a.]
Act VIII of 1894 (Tariff), as modified up to 1st February, 1906	0	9	0	[2a.]
Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898	0	7	6	[1a. 6p.]
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903	0	1	6	[1a.]
Act V of 1898 (Code of Criminal Procedure), as modified up *to 1st April, 1903*	3	10	0	[8a.]
Act VIII of 1899 (Petroleum), as modified up to 1st December 1904	0	7	0	[1a.]
Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900	0	1	0	[1a.]
Act III of 1900 (Prisoners), as modified up to 1st March 1905 ...	0	6	6	[1a.]
Act XV of 1903 (Extradition), as modified up to 1st December, *1904*	0	5	6	[1a.]
Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899	0	6	6	[1a.]
Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July 1903	0	1	9	[1a.]
Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897	0	[illegible]	[illegible]	[1a.]

Act	Edition	Rs.	A.	P.	
Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903	In Urdu	1	5	0	[5a.]
	In Nagri	1	5	0	[5a.]
Act V of 1861 (Police), as modified up to 7th March, 1903	In Urdu	0	2	9	[1a.]
	In Nagri	0	2	9	[1a.]
Act XVI of 1861 (Stage-Carriages), as modified up to 1st February, 1898	In Urdu	0	1	3	[1a.]
	In Nagri	0	1	3	[1a.]
Act III of 1864 (Foreigners), as modified up to 1st September, 1906	In Urdu	0	1	0	[1a.]
	In Nagri	0	1	0	[1a.]
Act VI of 1864 (Whipping), as modified up to 1st April, 1900	In Urdu	0	1	6	[1a.]
	In Nagri	0	1	6	[1a.]
Act III of 1865 (Carriers) as modified up to 31st May, 1903	In Urdu	0	0	9	[1a.]
	In Nagri	0	0	9	[1a.]
Act III of 1867 (Gambling), as modified up to 1st December, 1896	In Nagri	0	2	0	[1a.]
Act V of 1869 (Indian Articles of War) as modified up to 1st January, 1895 In English, Urdu and Nagri	Bound	3	0	0	[5a.]
	Unbound	2	8	0	[5a.]
Act VII of 1870 (Court-fees), as modified up to 1st December, 1896	In Urdu	0	8	3	[2a. 6p.]
Ditto ditto as modified up to 1st October, 1899	In Nagri	0	8	9	[1a.]
Act I of 1871 (Cattle-trespass), as modified up to 1st December	In Urdu	0	1	9	[1a.]
	In Nagri	0	1	9	[1a.]
Act XXIII of 1871 (Pensions), ...	In Urdu	0	0	9	[1a.]
	In Hindi	0	0	9	[1a.]
Act I of 1872 (Evidence), as modified up to 1st May, 1908	In Urdu	0	8	0	[2a.]
	In Nagri	0	8	0	[2a.]
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904 . .	In Urdu	0	2	6	[1a. 6p.]
Act IX of 1872 (Contract), as modified up to 1st September, 1899	In Urdu	0	9	9	[3a.]
	In Nagri	0	9	6	[3a.]
Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 ..	In Urdu	0	4	0	[2a.]
	In Nagri	0	4	0	[2a.]
Act V of 1873 (Government Savings Bank), .. as modified up to 1st April, 1903	In Urdu	0	0	9	[1a.]
	In Nagri	0	0	9	[1a.]
Act VIII of 1873 and (Northern India Canal Drainage), as modified up to 15th July, 1899	In Urdu	0	3	3	[1a.]
	In Nagri	0	3	3	[1a.]
Act X of 1873 (Oaths), as modified up to 1st February, 1903	In Urdu	0	0	9	[1a.]
	In Nagri	0	1	0	[1a.]
Act IX of 1875 (Majority), as modified up to 1st May, 1906	In Urdu	0	0	3	[1a.]
	In Nagri	0	0	3	[1a.]
Act of 1877 (Specific Relief), as modified up to 1st February, 1904	In Urdu	0	4	6	[1a 6p.]
	In Nagri	0	4	3	[1a 6p.]
Act III of 1877 (Registration), as modified up to 1st December, 1896	In Urdu	0	4	3	[2a.]
	In Nagri	0	4	6	[2a.]
Act I of 1878 (Opium), as modified up to 1st December, 1896	In Nagri	0	1	6	[1a.]
Act VII of 1878 (Forests), as modified up to 1st December, 1903	In Urdu	0	4	0	[1a. 6p.]
	In Nagri	0	3	9	[1a. 6p.]
Act XI of 1878 (Arms), as modified up to 1st May, 1904	In Urdu	0	2	0	[1a.]
	In Nagri	0	2	0	[1a.]
Act XVI of 1878 (Northern India Ferries), as modified up to 1st June, 1902	In Urdu	0	2	0	[1a.]
	In Nagri	0	2	0	[1a.]



Act	Language	Rs.	A.	P.	
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)	In Urdu ...	0	1	3	[1a.]
	In Nagri ...	0	1	3	[1a.]
Act XIV of 1897 (Indian Marine), as modified up to 15th February, 1899	In Urdu ...	0	3	6	[1a.]
	In Nagri ...	0	3	6	[1a.]
Act XV of 1887 (Burma Military Police) ...	In Urdu ...	0	0	9	[1a.]
	In Nagri ...	0	0	9	[1a.]
Act XVIII of 1887 (Allahabad University) ...	In Urdu ...	0	1	0	[1a.]
Act III of 1858 (Police), as modified up to 1st March, 1893	In Urdu ...	0	0	6	[1a.]
Ditto (as passed)	In Nagri ...	0	0	6	[1a.]
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	In Urdu ...	0	0	3	[1a.]
Ditto (as passed)	In Nagri ...	0	0	3	[1a.]
Act V of 1888 (Invention and Designs) ...	In Urdu ...	0	2	3	[1a.]
Act VI of 1888 (Debtors), ...	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act VII of 1888 (Civil Procedure Amendment) ...	In Urdu ...	0	1	9	[1a.]
	In Nagri ...	0	1	9	[1a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act II of 1889 (Measures of Length) ...	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act VI of 1889 (Marchandise Marks), as modified up to 1st February, 1904	In Urdu ...	0	1	9	[1a.]
	In Nagri ..	0	2	0	[1a.]
Act VI of 1889 (Probate and Administration) ...	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act X of 1889 (Ports), as modified up to 1st June, 1894	In Urdu ...	0	5	0	[2a.]
	In Nagri ...	0	5	0	[2a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895	In Nagri ...	0	3	0	[1a. 0p.]
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904	In Urdu ...	0	0	9	[1a.]
	In Nagri ...	0	0	9	[1a.]
Act XVI of 1889 (Central Provinces Land Revenue)	In Urdu ...	0	1	6	[1a.]
	In Nagri ...	0	1	6	[1a.]
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu ...	0	3	0	[1a.]
Act I of 1890 (Revenue Recovery)	In Urdu ...	0	3	0	[1a.]
Act II of 1890 (Amending Acts XVIII of 1884, X of 1865, II of 1874 and V of 1881) ...	In Urdu ...	0	3	0	[1a.]
Act V of 1890 (Indian Forest and Burma Forest Amendment)	In Urdu ...	0	0	6	[1a.]
Act VI of 1890 (Charitable Endowments) ...	In Urdu ...	0	0	6	[1a.]
Act VIII of 1890 (Guardians and Wards) ...	In Urdu ...	0	2	3	[1a. 9p.]
Act IX of 1890 (Railways), as modified up to 1st June, 1905	In Urdu ...	0	8	0	[2a.]
Act IX of 1890 (Railways), as modified up to 1st May, 1896	In Nagri ...	0	8	0	[2a.]
Act X of 1890 (Press and Registration of Books Amendment)	In Urdu ...	0	0	3	[1a.]
Act XI of 1890 (Prevention of Cruelty to Animals)	In Urdu ...	0	0	3	[1a.]

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need not be addressed to any particular person, nor expressed in violent and outrageous terms To "*incite*" means "to move to action, to stir up, to stimulate, to instigate or to encourage," and a newspaper article comes within the scope of section 3 if it is, as a matter of fact, calculated, directly or indirectly, to produce that effect. *Per* RYVES J There can be no hard-and-fast *canon as to what words or given set of words constitute "incitement."* It is a question of fact in each case, and must usually depend largely on concomitant circumstances The article must be read as a whole and, as far as possible, in the sense in which it was read by the section of the public to which it was primarily addressed, and also considered with regard to the occasion and place of publication and the class or status of persons likely to be affected by it.

TRESPASS—*Bonâ fides—Search for arms by Magistrate, whether executive or judicial*
—Statutory
Arms Act ([illegible]
of his belief,
(Act V of 1898), ss 94, 96, 105, 106, 165—Search-warrant—Magistrate as "Court"—Search by police officer—Police Act (V of 1861) s 4—Powers of District Magistrate—Letters Patent of 1865, s 20—Extra-

arrival of the District Magistrate in Jamalpur, on the morning of the 28th April, he received reports from the two Officers of the occurrences of the 27th April, and he was also informed that the police had reason

Act	Edition	Rs.	A.	P.	
Act VII of 1897 (Indian Emigration Act Amendment)	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	9	[1a.]
Act VII of 1897 (Reformatory Schools) ...	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	9	[1a.]
Act IX of 1897 (Provident Fund), as modified up to 1st April, 1903	In Urdu ...	0	0	9	[1a.]
	In Nagri ...	0	0	9	[1a.]
Act X of 1897 (General Clauses) ...	In Urdu ...	0	1	0	[1a.]
	In Nagri ...	0	1	0	[1a.]
Act XII of 1897 (Local Authorities Emergency Loans)	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act XV of 1897 (Cantonments)	In Urdu ...	0	0	3	[1a.]
Act I of 1898 (Stage Carriages Act [1861] Amendment)	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act III of 1898 (Lepers)	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act IV of 1898 (Indian Penal Code Amendment)	In Urdu ...	0	0	3	[1a.]
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1900 ...	In Urdu ...	1	4	0	[8a.]
	In Nagri ...	1	6	0	[8a.]
Act VI of 1898 (Post Office)	In Urdu ...	0	2	0	[1a.]
	In Nagri ...	0	2	0	[1a.]
Act IX of 1899 (Live-Stock Importation) ...	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act X of 1898 (Indian Insolvency Rules) ...	In Urdu ...	0	0	3	[1a.]
Act I of 1899 [Indian Marine Act (1887) Amendment]	In Urdu ...	0	0	6	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act II of 1899 [Stamp], as modified up to 31st August, 1905	In Urdu ...	0	7	6	[1a.]
	In Nagri ...	0	7	6	[1a.]
Act III of 1900 (Prisoners), as modified up to 1st March, 1905	In Urdu ...	0	2	3	[1a.]
	In Nagri ...	0	2	3	[1a.]
Act VI of 1899 (Government Buildings) ...	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment]	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act VIII of 1899 (Petroleum)	In Urdu ...	0	0	9	[1a.]
	In Nagri ...	0	0	9	[1a.]
Act XI of 1899 (Arbitration)	In Urdu ...	0	0	9	[1a.]
	In Nagri ...	0	0	9	[1a.]
Act XI of 1899 (Court-fees Amendment) ...	In Urdu ...	0	0	9	[1a.]
	In Nagri ...	0	0	6	[1a.]
Act XII of 1899 (Currency Notes Forgery).	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act XVI of 1899 (Tariff Amendment) ...	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act XVII of 1899 (Indian Registration Amendment)	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act XVIII of 1899 (Land Improvement Loans Amendment)	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act XX of 1899 (Presidency Banks) ...	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]
Act XXI of 1899 (Central Provinces Tenancy Amendment)	In Urdu ...	0	0	3	[1a.]
	In Nagri ...	0	0	3	[1a.]



		Rs.	A.	P.	
Act XIV of 1903 (Indian Foreign Marriages)	In Urdu	0	0	3	[1a.]
	In Nagri	0	0	3	[1a.]
Act XV of 1903 (Extradition), as modified up to 1st December 1904 ...	In Urdu	0	1	0	[1a.]
	In Nagri	0	1	0	[1a.]
Act I of 1904 (Poisons)	In Urdu	0	0	6	[1a.]
	In Nagri	0	0	6	[1a.]
Act III of 1904 (Local Authorities Loan) ...	In Urdu	0	0	3	[1a.]
	In Nagri	0	0	3	[1a.]
Act IV of 1904 (North-West Border Military Police)	In Urdu	0	0	9	[1a.]
Act VI of 1904 [Transfer of Property Act (Amendment)]	In Urdu	0	0	3	[1a.]
	In Nagri	0	0	3	[1a.]
Act VII of 1904 (Ancient Monuments Preservation	In Urdu	0	0	9	[1a.]
	In Nagri	0	0	9	[1a.]
Act VIII of 1904 (Indian Universities) ...	In Urdu	0	1	3	[1a.]
	In Nagri	0	1	3	[1a.]
Act X of 1904 (Co-operative Credit Socities)...	In Urdu	0	1	0	[1a.]
	In Nagri	0	1	0	[1a.]
Act XI of 1904 (to revive and continue section 8B of the Indian Tariff Act 1894)...	In Urdu	0	0	3	[1a.]
	In Nagri	0	0	3	[1a.]
Act XII of 1904 (Emigration)	In Urdu	0	0	3	[1a.]
	In Nagri	0	0	3	[1a.]
Act XIII of 1904 (Indian Articles of War)	In Urdu	0	0	3	[1a.]
	In Nagri	0	0	3	[1a.]
Act XV of 1904 [Indian Stamp Act (Amendment)]	In Urdu	0	0	3	[1a.]
	In Nagri	0	0	3	[1a.]
Act I of 1905 [Local Authorities Loan Act (Amendment)]	In Urdu	0	0	3	[1a.]
	In Nagri	0	0	3	[1a.]
Act II of 1905 [Indian Universities (Validation)]	In Urdu	0	0	3	[1a.]
	In Nagri	0	0	3	[1a.]
Act III of 1905 (Indian Paper Currency) ..	In Urdu	0	0	9	[1a.]
	In Nagri	0	0	9	[1a.]
Act IV of 1905 (Indian Railway Board) ...	In Urdu	0	0	3	[1a.]
Act VI of 1905 (Court-fees Amendment Act)	In Urdu	0	1	6	[1a.]
	In Nagri	0	0	3	[1a.]
Act VII of 1905 (Bengal and Assam Laws).	In Urdu	0	0	3	[1a.]
	In Nagri	0	0	3	[1a.]
Regulation I of 1890 (British Baluchistan Laws)	In Urdu	0	2	0	[1a. 9p.]
Regulation V of 1890 (British Baluchistan Forests)	In Urdu	0	2	0	[1a. 6p.]
Regulation VI of 1893 (Hazara Forests) ...	In Urdu	0	2	0	[1a. 6p.]
Rgulation VIII of 1896 (British Baluchistan (Criminal Justice)	In Urdu	0	0	0	[1a.]
Regulation IX of 1896 (British Baluchistan Civil Justice)	In Urdu	0	2	3	[1a.]
Regulation III of 1901 (Frontier Crimes) ...	In Urdu	0	2	6	[1a.]

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in the Camp," the terms of which are set forth in the judgment of the High Court. By order of the Lieutenant-Governor in a communication, dated the 21st October, from the Chief Secretary to the Government of Bengal, to Superintendent Ellis, C. I. D., a written application was made by the latter under section 3 (1) of the Newspapers (Incitements to Offences) Act, to the Chief Presidency Magistrate, who, after examining him, passed a conditional order, on the 23rd October, declaring the printing press used for printing the said newspaper at 2-1, Creek Row, or found upon the said premises, and all copies of such newspaper, to be forfeited to His Majesty, and directing all persons concerned to appear before the Court, on the 30th instant, to show cause why the order should not be made absolute. A copy of the said order was duly affixed to the said premises, being the premises specified in the declaration made in respect of the "*Bande Mataram,*" newspaper, under section 5 of the Press and Registration of Books Act (XXV of 1867).

On the date fixed for the hearing of the case, Girija Sundar Chuckerbutty, the manager of the "*Bande Mataram,*" appeared by Counsel and admitted the publication of the obnoxious article in its issue of the 12th September, but denied that it came within the purview of section 3 (1) of the Newspapers Act of 1908. Four witnesses of a formal character were called for the prosecution and the Chief Presidency Magistrate, after hearing the defence, made the conditional order absolute on the 4th November, and directed the issue of a warrant to the police to seize and carry away the printing press. Girija Sundar Chuckerbutty then appealed to the High Court under section 5 of the Act.

The learned Chief Presidency Magistrate stated in his judgment that it was a matter of public notoriety that a conspiracy existed in Calcutta and other places, the object of which was assassination. On the discovery of the conspiracy several persons were arrested and put up for trial at Alipore for manufacturing and being in illegal possession of bombs and for other

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The Advocate-General (*Mr. Sinha*), instructed by *Mr. Hume*, for the Crown. The Act has nothing to do with the intention of the writer, nor is it necessary that the incitement should be direct. It is not necessary that there should be an "aiding or abetting," but even if it were, the article would come under the Act: see Mayne's Criminal Law, p. 470. It holds up to admiration Kanai's deed, and implies that others will follow. The act, it says, is historical. A person cannot escape the consequences of his act by veiling his expressions. There may be incitement by approbation of a crime. The expressions "emancipation," "hated monster," "the cause has produced a votary," "giving up his comrades" are full of meaning. The last paragraph of the article, far from minimising the gravity of the offence, really aggravates it. The case of *Reg.* v. *Most* (1) is similar, though the language is stronger: see also *Queen* v. *Coney* (2). Refers to Russell on Crimes, Vol. I, p. 171, Archbold, p. 15, Stroud's Judicial Dictionary, p. 419, "counsel or procure," and Stephen's Digest, Art. 47, p. 152*n*, for the meaning and character of "incitement." The English statutes cited do not help.

HOLMWOOD J. This is an appeal in what is known as the "*Bande Mataram*" press confiscation case. We admitted the appeal without hearing the application for admission, as the case is the first under the new statute, and it was desirable that the scope and effect of the Act and its bearing on the facts of the present case should receive judicial consideration after full discussion by both parties at the Bar. We have now had the advantage of a very able and temperate argument from the learned Vakil for the appellant, Babu Dasarathi Sanyal, and a vigorous and well reasoned reply by the learned Advocate-General.

We do not propose to go into all the cases cited before us on the subject of abetment by incitement, since those cases are

(1) (1881) 14 Cox C. C. 583; L. R. 7 Q. B. D. 244.

(2) (1882) L. R. 8 Q. B. D. 534, 557.

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GIRIJA SUNDAR CHUCKERBUTTY v. EMPEROR.

HOLMWOOD J.

1908. The procedure of the Magistrate under that section is not in any way impugned before us, nor is it contended that it is necessary to prove any criminal intention against any person under the Act. The contention before us is simply this that the article itself does not, as a matter of fact, contain any incitement to murder or to any act of violence.

The argument on this, the only point in the case, divides itself into two heads: *first*, the meaning of the word "incitement," which is not defined in any Indian statute, and, *secondly*, the effect of the article itself read as a whole and in reference to the passages in it, which are found to constitute an incitement.

As regards the first point, it is conceded that the interpretation of an undefined word in an Indian statute cannot be derived from its definition in any English or foreign statute.

But the wording of certain statutes and extracts from the judgments in certain English cases are cited as illustrating the meaning of the word as derived from the recognised dictionaries of the English language, *viz.*, Webster and the Century. These are cited as giving the ordinary meaning of the word, which is all we are really concerned with. Now the words cited from these statutes and cases do not carry the definition any further, and the real object of their citation seems to us to be to import into this case the doctrine of English law that, in order to saddle persons with criminality in certain cases as accessories before the fact, it is necessary that there should be a certain degree of direct incitement.

But, as we said before, there is in this case no question of incriminating any person as accessory to any crime, and the words of the statute are "any incitement," which include direct and indirect incitement.

As to the meaning of the word, we find it to mean "to move to action, to stir up, to stimulate, to instigate or to encourage."

The only question that remains is whether the article in question is, as a matter of fact, calculated, directly or indirectly, to move to action, to stir up, to stimulate, to instigate or to

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GIRIJA SUNDAR CHUCKERBUTTY v. EMPEROR.

HOLMWOOD J.

"Yet the crowning pity of it is that such a splendid life should have to be thrown away in the course of this bomb affair. Bombs can never bring independence, said Barindra Kumar Ghose in his confession before the Magistrate at Alipore, and truly enough. And it was at a very unlucky and inauspicious moment that he and those he names mistook the voice of the misguided few calling for the blood of an official or two to be the voice of the nation. The removal of a few servants of the bureaucracy cannot even touch the fringe of the problem of national deliverance, and one cannot resist the tear at the thought that there has to be immolated on the altar of an undertaking so fated to fruitlessness such invincibility of spirit, that some passionate, immortal scorn of death that showed itself in Asia after a long interval at Kin-chain the other day."

We think that there can be no doubt not only that the whole article is an indirect and veiled incitement to violence, but that the third paragraph is a direct incitement to murder informers. It is immaterial that two European newspapers, which are exhibited and cited for the defence, have the unwisdom to express a view of the Alipore jail murder, which might lead people to suppose that the murder of an informer was a less heinous offence than the murder of an ordinary person. The legal consequences are the same, and this is duly pointed out, and the legal consequences of incitement to such a murder or to any act of violence must also be the same.

It may be conceded that the incitement in this case is not of the violent and outrageous character of that in the well-known case of *Reg.* v. *Most* (1), but that case was only cited as an authority for the proposition, which is not disputed before us, that the incitement need not be addressed to any particular person. It has no bearing on the words of this Act which, as we have seen, cover "any incitement," open or veiled.

(1) (1881) L. R. 7 Q. B. D. 244; 14 Cox. C. C. 583.



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GIRIJA SUNDAR CHUCKERBUTTY v. EMPEROR

HOLMWOOD J.

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(1) (1881) L. R. 7 Q. B. D. 244; 14 Cox. C. C. 583.

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Girija Sundar Chuckerbutty v. Emperor

Ryves J.

of the newspaper, "*Bande Mataram*," wherever found, be maintained.

RYVES J. I entirely agree and wish to add only a few words. I do not think there is any real difficulty in ascertaining what the Legislature meant by the word "incitement" in Act VII of 1908. The word itself is familiar enough, and as it has not been specifically defined in this Act or in any other Act of the Indian Legislature to have a special or restricted meaning, I think it should be understood in its ordinary acceptation. If that is so, the only question we have to decide is whether this article amounts to an incitement within the meaning of the Act.

There can, I think, be no hard-and-fast canon to decide what words, or whether a given set of words, constitute an "incitement" to murder or to any act of violence. It is really a question of fact in each case, and must usually depend very largely on concomitant circumstances. We must read the article as a whole, and read it, as far as possible, in the sense in which it was read by that section of the public to whom it was primarily addressed, and must also bear in mind the occasion and place of its publication and the class or status of persons, who are likely to be affected by it. Having regard to all these considerations, I can come to no other conclusion than that the publication of this article on the 12th of September last in the "*Bande Mataram*" newspaper, which was published in Calcutta and circulated in both these provinces, does undoubtedly come within the ban of the Act. I, therefore, agree in the order of my learned brother.

Appeal dismissed.

E. I. M.

1908

JYOTINDRA NATH DAW v. HEM CHANDRA DAW.

declined to interfere with the order of dismissal. If the motion had not been made, I would have passed the necessary orders on this petition, but I think, as the present application is after the District Magistrate's order, it should go to him for orders. All I can say is that I see no legal objection to the revival of the case."

The District Magistrate on the same date passed an order in these terms when the case was referred to him :—

"This matter has nothing to do with me. I have already disposed of the *petition of motion which was filed before me. The Deputy Magistrate must act* on the petition filed before him according to his own discretion."

The Deputy Magistrate thereupon, after hearing the muktear for the accused, issued a summons against the petitioner under section 323 of the Penal Code.

Babu Narendro Kumar Bose, for the petitioner. The revival of the case by the Deputy Magistrate is *ultra vires*. The District Magsitrate's order was an obstacle to his doing so.

SHARFUDDIN AND COXE JJ. This is a Rule calling upon the District Magistrate of Burdwan to show cause why the order of the Deputy Magistrate, dated the 12th August 1908, reviving the case of the petitioner, should not be set aside.

It appears that the complainant in this case lodged his complaint on the 29th May 1908. He was referred to the Assistant Surgeon for examination of his injuries, and was directed by the Court to prove his case on the 19th June 1908, on which date his witnesses were not present. Then the case was fixed for the 9th July. On the 9th July, the case was dismissed under section 203 of the Criminal Procedure Code by the Deputy Magistrate on the ground of the absence of the complainant's witnesses. We then find the complainant moving the District Magistrate on the 23rd July 1908, under section 437 of the Criminal Procedure Code, on which the District Magistrate passed the following order :—"The non-appearance of the witnesses is due to the fault of the complainant who failed to take out process against them. I decline to order further inquiry." We again find that, on the 12th August 1908, the complainant put in a petition before



APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

1909
Jan. 8.

CHANDRA KUMAR MAJHI
v.
SANDHYAMANI.*

Legal representative—Civil Procedure Code (Act XIV of 1882), ss. 371, 582—Death of one defendant—Representative of deceased defendant, when can be substituted—Omission to substitute at death of defendant, effect of—Agreement between surviving defendant and plaintiffs.

Where the legal representatives of a deceased defendant (who died after appealing to the lower Court and before the appeal to the High Court) were under the impression that the co-defendant was prosecuting the appeal and challenging the validity of the entire decree, they could not be blamed for their omission to take any steps to have themselves brought on the record, and they ought to be allowed leave to step in and revive and prosecute the appeal on their own behalf on their discovering that the plaintiff had by arrangement relieved the co-defendant of all responsibility and thrown the burden upon the legal representatives of the deceased defendant.

SECOND APPEAL by the petitioners, Chandra Kumar Majhi and others, for revival of the appeal.

The plaintiffs, respondents in this Court, brought a suit for arrears of rent, against Bashiram Majhi, Banamali Majhi and Sridam Majhi. The suit was decreed after contest. Bashiram Majhi and Banamali Majhi preferred an appeal to the District Judge's Court. The appeal was dismissed on the 28th February 1905. Bashiram died in May/June 1905. Banamali alone preferred a second appeal to the High Court. In June 1906, the High Court remanded the case for deciding it after determination of certain points. The case was then transferred to the Court of the Officiating Second Subordinate Judge at Barisal. In March 1907, the plaintiffs, opposite parties, respondents made an application to the said Second Subordinate Judge at Barisal for withdrawal of the suit as against

* Appeal from Original Order No. 457 of 1907, against the order passed by Ashutosh Banerjee, Subordinate Judge of Barisal, dated July 27, 1907.

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to believe that fire-arms were stored in certain cutcheries belonging to Hindu zemindars In consequence, the District Magistrate accompanied by the District Superintendent of Police proceeded to search the cutcheries Under the orders of the District Magistrate, the cutchery of the respondent was forcibly entered, boxes forced open ... 'Iagis- ... rfect ... the ... con- ... and in the circumstances of the case, the search was warranted by no Statute. When Executive Officers are invested with Statutory powers of a special and drastic nature, before exercising those powers, they must strictly comply with the provisions of the Act which created ...

referred to

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CHANDRA KUMAR MAJHI v. SANDHYA-MANI.

Banamali then preferred a second appeal to this Court. This second appeal was heard on the 13th June 1906, with the result that at the instance of the sole appellant the entire decree of the Court below was set aside and the case was remitted to the Subordinate Judge in order that the appeal might be reheard. When the appeal came to be reheard before the Subordinate Judge, the first appellant Bashiram was dead and no steps had apparently been taken by his legal representatives to bring themselves on the record. In these circumstances, some arrangement was entered into between the other appellant Banamali and the plaintiffs respondents, with the result that the latter applied for leave to withdraw the suit against Banamali. The Subordinate Judge granted the application. But the order which he made did not in terms permit the withdrawal of the suit as against Banamali. He allowed the appeal of Banamali, the result of which would be that the suit was dismissed as against Banamali, and he went on to add that the decree of the first Court as against the other defendants would stand good. If we appreciate the effect of his order correctly, the result of this arrangement between the plaintiffs and the defendant Banamali was that the entire burden of the decree for rent made by the Court of first instance was thrown upon the other defendants, who were not represented before the Subordinate Judge. It is not necessary for us to express any opinion as to the propriety of the order which the Subordinate Judge made, because that order is not in question before us in the present case. But the result, which might have been anticipated, followed. As soon as the legal representatives of Bashiram discovered that the plaintiffs had withdrawn their suit against Banamali and thrown the entire burden of the decree upon them and Sridam, they applied for permission to revive the appeal and prosecute it The learned Subordinate Judge held that they had not made out any sufficient cause within the meaning of section 371 of the Civil Procedure Code, which prevented them in due time from continuing the appeal. We are unable to accept the view taken by the Subordinate Judge. Upon the facts which we have stated, it is quite clear that upon the death of Bashiram.

APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

GIRIJA SUNDAR CHUCKERBUTTY

v.

EMPEROR.*

1908
Dec. 14.

Newspapers (Incitements to Offences) Act (VII of 1908), s. 3—Nature of offence under the Act—Incitement to assassination—"Incitement," meaning of—Direct or indirect incitement—General incitement, not addressed to particular persons—Construction of offensive article.

The question of the intention or knowledge of an individual may determine his criminal liability under the ordinary law of abetment by incitement by means of words, written or spoken, but under the Newspapers (Incitements to Offences) Act no question of the intention of the writer, printer or publisher arises, and no personal liability is imputed to any particular person.

The order thereunder is not one against any person, but is purely restrictive and directed against the use, or intended use, of a press for the purpose of printing or publishing a newspaper containing any incitement to murder or to any offence under the Explosive Substances Act (VI of 1908) or to any act of violence

The words "*any incitement*" in section 3 (1) of the Newspapers Act include direct and indirect incitement, and need not be addressed to any particular person, nor expressed in violent and outrageous terms.

To "*incite*" means "to move to action, to stir up, to stimulate, to instigate or to encourage," and a newspaper article comes within the scope of section 3 if it is, as a matter of fact, calculated, directly or indirectly, to produce that effect.

Per RYVES J. There can be no hard and fast canon as to what words or given set of words constitute "incitement" It is a question of fact in each case, and must usually depend largely on concomitant circumstances. The article must be read as a whole and, as far as possible, in the sense in which it was read by the section of the public to which it was primarily addressed, and also considered with regard to the occasion and place of publication and the class or status of persons likely to be affected by it.

IN the issue of the "*Bande Mataram*," a newspaper printed and published in Calcutta, dated the 12th September 1908, there appeared an article in four paragraphs entitled "*Traitor*

* Criminal Appeal No 908 of 1908, against the order of T. Thornhill, Chief Presidency Magistrate, dated Nov. 4, 1908.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

1909
Jan. 11.

CHANDRABALA DEBI
v.
PRABODH CHANDRA RAY.*

Execution—Sale—Adjournment of sale for compromise—Time, the essence of the agreement of parties—Failure to pay on the final date—Part-payment, refusal to accept—Jurisdiction of Court to extend time—Civil Procedure Code (XIV of 1882), ss. 244, 311.

Where time had previously been repeatedly granted by the Court at the instance of the judgment-debtor with the consent of the decree-holders for compromise, and on the final date to which payment was adjourned, the judgment-debtor prayed for further time and the decree-holder demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that, upon her failure to pay the money on the date to be fixed, her right to challenge the validity of the sale should finally cease, and such an arrangement was definitely sanctioned by the Court with the consent of all the parties :—

Held, that the Court had no jurisdiction subsequently to vary the terms of the final agreement, at the instance of the judgment-debtor, in spite of the protest of the decree-holder.

Haralh Singh v. *Saheb Singh* (1) explained and followed *Uttam Chandra Krithy* v. *Khetra Nath Chattopadhya* (2) referred to

Held, further, that an appeal need not be preferred against every interlocutory order in an execution proceeding.

Behary Lal Pundit v. *Kedar Nath Mullick* (3) followed.

Held, also, that it is open to the party aggrieved to challenge by an appeal against the final order, which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings.

SECOND APPEAL by the petitioner, Chandrabala Debi.

The property of one Rajendra Kumar Ray Chaudhuri was sold in execution. Chandrabala Debi, the petitioner in this

* Appeals from Appellate Orders Nos. 145 and 153 of 1908, against the order of E. P. Chapman, District Judge of 24-Parganas, dated Jan. 20, 1908, reversing the order of Amrita Lal Palit, Munsif of Alipur, dated Aug. 27, 1907.

(1) (1907) 6 C. L. J. 176. (2) (1901) I. L. R. 29 Calc. 577.
(3) (1891) I. L. R. 18 Calc. 469.

offences in connection therewith. Among them were Kanai Lal Dutt, Satyendra Nath Bose and Narendra Nath Gossain. The last-named made a confession and gave further information which led to the arrest of other persons. He was made an approver and his evidence recorded in the preliminary inquiry before the District Magistrate of Alipore. During the pendency of the inquiry he was shot in jail, on the 31st August 1908, by Kanai and Satyendra, who were convicted and executed for his murder.

Babu Dasarathi Sanyal (with him *Mr. S. C. Mookerjee* and *Babu Debendro Narayan Bhattacharjee*), for the appellants. The only question in the case is whether the article contains any incitement to murder or to any act of violence within the meaning of the Act. The word "*incitement*" is not defined in the Act. It must be construed in its ordinary and natural sense: see Maxwell on Interpretation, pages 2 and 3, and *Vestry of St. John* v. *Cotton* (1). Refers to the Century, Ogilvie and Webster's dictionaries for the meaning of the word. It being a word of doubtful import, the English law may be looked to as a guide. The English statutes relating to incitement to offences, in which "incitement" or its synonym has been used, are 37 Geo. III, c. 70, 7 Will. IV, 1 Vic., c. 36, 24 and 25 Vic, c. 100, and 52 and 53 Vic, c. 52. *See* also the Irish statutes, 36 Geo. III, c. 37 and 38 Geo III, c. 57. Having reference to these statutes and the dictionaries, in order to constitute an incitement, there must be a "moving to action," that is, some *active* incitement. A person, who counsels, procures or commands another to commit an offence is guilty of incitement: see Stephen's History of the Criminal Law, Vol. II, p. 230. The article in question, though amounting to wholly unjustifiable and senseless approbation of murder, does not contain any direct incitement, "spurring on" or "urging on" to murder. The writer had no such intention at all.

(1) (1886) L. R. 12 App. Cas. 1, 6.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

1909
Jan. 11.

CHANDRABALA DEBI
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(3) (1891) I. L. R. 18 Calc. 469.

concerned with the criminal liability and intention of persons under various statutes enacted to punish individuals for words and conduct therein declared unlawful. In the case of those individuals the intention and knowledge of the accused person is necessarily involved. In the present case our task is much simpler. The order is not one against any person; it is purely restrictive and directed against the use of a certain printing press, which, in the opinion of the Magistrate, on application made by order of, or under authority of, the Local Government under section 3 of the Act (VII of 1908), has been used or is intended to be used for the purpose of printing or publishing a newspaper containing any incitement to murder or to any offence under the Explosive Substances Act (VI of 1908) or to any act of violence.

On this enactment no question of the intention of the writer, printer or publisher arises, and no personal criminality is imputed to any individual. It is a simple question of fact whether the newspaper printed and published by the press in question does contain any incitement as above set out. In this case a conditional order under section (3), clause (1), was issued by the Presidency Magistrate, on the 23rd October 1908, declaring the printing press used for printing the newspaper, known as the "*Bande Mataram*" at 2-1, Creek Row, or found upon the said premises, and all copies of such newspaper, to be forfeited to His Majesty, and calling upon all persons concerned in the said printing press to appear before the Magistrate, on the 30th October, to show cause why the order should not be made absolute.

Counsel for the manager, Girija Sundar Chuckerbutty, the appellant before us, appeared to show cause, and admitted that the article complained of was published by the said press in the "*Bande Mataram*" of the 12th September 1908, but contended that it did not come within section 3 of the Act.

The Magistrate found that the article contained an incitement to murder approvers or to commit acts of violence, and he, accordingly, made the order absolute on the 4th November

1909

CHANDRA-BALA DEBI v. PRABODH CHANDRA RAY.

Chattopadhya (1) and *Harakh Singh* v. *Saheb Singh* (2). As to discretion of Court and its powers, see the new Code (Act V of 1908), section 151.

Babu Neelmadhab Bose, for respondent. In these matters, besides the parties, there is a third party, *viz.*, the Court. Without the sanction of the Court no agreement can be effective, nor can an agreement be modified. The Court has neither the jurisdiction to vary the terms of the agreement against the wishes of one of the parties to the agreement. In all such applications, time is of the essence of the agreement. The third application (*viz.*, of the 31st July) conclusively proved that time was of the essence of the contract. The time allowed for payment was sufficient, and it was never contended in the Courts below that it was not.

Mr. Caspersz, in reply. Certainly, the decree-holder should have appealed against the interlocutory orders immediately after they were passed.

MOOKERJEE AND CARNDUFF JJ. These appeals are directed against two orders of the District Judge of 24-Parganas by which he discharged two orders made by the Munsif setting aside two execution sales held on the 29th March and 30th October 1906, respectively. The circumstances under which these orders were made must be set out in detail in order that our decision may be intelligible.

It appears that applications were made by the judgment-debtor to set aside these execution sales under sections 244 and 311 of the Code of Civil Procedure of 1882, on the ground of fraud and material irregularity. During the pendency of these proceedings the parties negotiated for a compromise, and on the 1st June 1907 an application was made to the Court for an adjournment to enable them to carry it out. In this application it was stated that a proposal for an amicable settlement was in progress, that the decree-holder had agreed to

(1) (1901) I. L. R. 29 Calc. 577. (2) (1907) 6 C. L. J. 176.

encourage to murder or acts of violence. The article runs as follows :—

"*Traitor in the Camp.* From Joychand to Omichand is a far cry, but the political history of our country for all those long centuries of indelible shame can be summarized and accounted for in the four short words—'traitor in the camp.' Reading down the pages of the annals of that interminable period of disgrace, you will hardly come across the account of a single movement towards emancipation that had not nursed in its bosom one or more vipers named 'traitors' who, whilst remaining within the camp in the seeming guise of loyal adherence, betrayed the object of their perjured allegiance at the season of fruition."

"But need we stop at Omichand ? Are there not traitors in the land to-day, who would sell their souls as readily for the paltry privilege of wearing a jewelled sabre, or for a ribbon to stick in their coat, or for a title to cover their base birth with ? For it is in the blood of some of our countrymen, this accursed proneness to perfidy, and has been there ever since the loss of our independence, and Heaven alone knows when the last drop of it shall have been spilled or become sterile. And the no less singular feature of this ghastly thing is that, through all these countless years, it is always the person, at whose instance he turned traitor, who has punished the miserable miscreant, but the country could never find a single son to rise and avenge her on the hated monster by smiting him to the ground."

"Now for the first time the current is turned. For the very first time a cause has produced a votary, who has willingly sacrificed his life to visit on its betrayer his merited doom. Kanai has killed Narendra. No more shall the wretch of an Indian, who kisses away the hands of his comrades, reckon himself safe from the avenging hand 'The first of the avengers' history shall write of Kanai. And from the moment he fired the fatal shot the spaces of his country's heaven have been ringing with the echo of the voice—'beware of the traitor's fate."

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Court, however, did not sanction the arrangement and granted only nine days' time as appears from the following order recorded in the order sheet: "on the application of the petitioner consented to by the opposite party, ordered to be put up on the 31st July 1907 for hearing, Rs. 9 to be credited towards the decretal money." It will be observed that as the Court did not sanction the application of the parties, it cannot be successfully contended that upon the failure of the judgment-debtor to pay the decretal amount to the decree-holder as agreed upon, the sale would stand confirmed. On the 31st July there was a fresh application by the judgment-debtor. In this she stated that although two adjournments had been previously granted with the consent of the decree-holder for payment of the sum decreed to him, she had not been able to raise the necessary funds. She, therefore, prayed that another 15 days' time might be given to her. The petition concluded with the following very important provision: "If I pay the whole of the decretal amount, the sales will stand cancelled. On default of payment of the whole money on that date, the sales will stand good, and I shall not further pray for time." The decree-holder signified his consent in the following terms at the foot of the petition: "If the money is not paid within the date fixed, the sale will stand good. Upon this condition I take Rs. 10 and give sanction to this application." The matter was then placed before the Court and the following order was recorded on the order sheet: "On the application of the petitioner consented to by the opposite party, ordered—put up on the 15th August next for orders on condition stated thereon, Rs. 10 to be credited against the decretal money." When, however, the 15th August came, the judgment-debtor still found herself unable to pay the decretal amount as she had agreed to do, and on that date she applied for further time. To this the execution-creditor objected. The learned Judge did not then decide what the effect of a partial payment on that date or at a later stage would be, but permitted the judgment-debtor to deposit Rs. 150 in Court and allowed her time till the 21st August to pay the balance of the decretal

We may point out that the incitement in this case, addressed as it is to the youth of a peculiarly emotional and intellectually subtle race, is probably the most effective and dangerous form of incitement that could be addressed to them.

The glorification of the votary of the cause "who has willingly sacrificed his life to visit on its betrayer his merited doom" is obviously most calculated to act upon the misguided and unbalanced ardour of youth, who are ready to plunge into hopeless and futile rebellion under the mistaken notion that it is patriotism

The canonization of Kanai as "the first of the avengers" who has made the spaces of his country's heaven ring with the echo of the voice—"beware of the traitor's fate," evidently contemplates and encourages the notion that others will be thereby induced to follow his example The threat of violence to any Indian who "kisses away the hands of his comrades" obviously implies that the writer desires to influence his readers to make his threat good

It is urged that the fourth and last paragraph deprecates assassination, and makes it possible to interpret the third paragraph as mere approbation of the isolated act of Kanai, and not as an incitement to further murders and violence

But, in our opinion, this paragraph rather aggravates the dangerous character of the article It deprecates isolated assassinations as useless, but it implies that the wholesale removal of the bureaucracy would assist the cause of national independence This is obviously in no sense a mitigation of the previous incitement. We find, therefore, that the article complained of does contain an incitement to murder and acts of violence, and that it, therefore falls within the scope of Act VII of 1908

It is not contended that any other consequence can follow on this finding than the one and only penalty prescribed by the Act.

We, accordingly, dismiss the appeal, and direct that the order absolute for the forfeiture of the press and all copies

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in fact, contended that, after this application of the 29th June had been made, the Court had seisin of the case, and it was not open to the parties subsequently to modify the arrangement into which they had entered on that date. In support of this contention, much reliance was placed upon an observation in the judgment of this Court in *Harakh Singh* v. *Saheb Singh* (1) to the effect that, in cases of this description, what the Court has to do is to determine whether the parties intended in the first conception of the agreement to make time the essence of the contract. On the other hand, it has been argued on behalf of the decree-holder that an agreement of this character can be operative only with the assent of the Court, and that, if the Court does not sanction a particular arrangement and refuses to grant an adjournment, the agreement can have no practical effect. This position the appellant did not contest, and we feel no doubt that it represents the right view of the matter. But the necessary inference from this position is that, if initially an agreement is entered into by the parties with the assent of the Court, it is open to the parties at a subsequent stage with the approval of the Court to modify that agreement. This view is in no way inconsistent with the decision in *Harakh Singh* v. *Saheb Singh* (1) where no question arose or was decided as to the power of the parties to modify the original agreement. The question then is—Was there such a modification in the present case? In our opinion, there is no room for doubt that, whatever might have been the character of the original agreement of the 29th June 1907, it was modified by the application of the 31st July 1907. Assume for a moment that upon the application of the 29th June it would have been open to the Court, as a Court of Equity to determine what would be a reasonable time for the payment of the money, it cannot be suggested that the Court could not at a later stage, upon the joint application of the parties, alter that agreement and give its sanction to a fresh arrangement which would finally regulate the rights of the parties. What was then the effect of this agreement of the 31st

(1) (1907) 6 C. L. J. 176

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it was not necessary for him to do so. As was pointed out by this Court in the case of *Behary Lal Pundit* v. *Kedar Nath Mullick* (1) an appeal need not be preferred against every order in an execution proceeding. If the contrary view prevailed, and if appeals were allowed to be preferred against interlocutory orders, there might be innumerable appeals in the course of one execution proceeding. It is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. Besides, in this case, as the learned vakil for the respondent pointed out, in the appeal which was preferred against the final order, the order of the 15th August was specifically mentioned as an order which ought not to stand. We are of opinion, therefore, that it was open to the learned District Judge, in hearing the appeal against the orders of the 27th August, to determine the validity of the orders of the 15th August. On these grounds, we must hold that the orders of the District Judge are correct and should be affirmed. The result is that the appeals fail and must be dismissed with costs.

Appeal dismissed.

S. M.

(1) (1891) I. L. R. 18 Calc. 469

CRIMINAL REVISION.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

JYOTINDRA NATH DAW
v.
HEM CHANDRA DAW.*

1908
Sept. 10.

Complaint—Dismissal of complaint by Subordinate Magistrate—Refusal by District Magistrate to order further inquiry—Revival of complaint after such refusal—Criminal Procedure Code (Act V of 1898), ss. 203 and 437.

A Subordinate Magistrate who has dismissed a complaint under s. 203 of the Code is competent to revive it notwithstanding that the District Magistrate has refused to order a further inquiry in the matter on application made to him for that purpose.

On the 29th May 1908, one Hem Chandra Daw lodged a complaint before a Deputy Magistrate at Burdwan against the petitioner and others, under sections 352 and 323 of the Penal Code. The Magistrate, after examining the complainant, fixed the 19th June for evidence, acting apparently under section 202 of the Criminal Procedure Code. On that day, the complainant's witnesses being absent, the case was postponed to the 9th July, but the witnesses were still absent, and the complaint was dismissed under section 203 of the Criminal Procedure Code. On the 23rd instant, Hem Chandra moved the District Magistrate of Burdwan for a further inquiry under section 437 of the Criminal Procedure Code, but the latter declined to order such inquiry on the ground that the non-appearance of the witnesses was due to his fault in not taking out processes against them. The complainant then filed a petition before the Magistrate who had dismissed the complaint, praying for a revival of the case. This Magistrate passed an order on the 12th August to the following effect :—

"In the present case the order of dismissal was for not producing witnesses on the fixed date. There was a motion before the District Magistrate who

* Criminal Revision No. 1015 of 1908, against the order of M. A. Kadir, Deputy Magistrate, Burdwan, dated Aug. 12, 1908.

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MAHOMED SHAH v. OFFICIAL TRUSTEE OF BENGAL.
STEPHEN J.

Mr. Langford James, for the Official Trustee.

STEPHEN J. The plaintiff in this case sues to have it declared that he is the absolute owner of a certain Government promissory notes of the value of Rs. 37,500 now in the custody of the Official Trustee.

The case depends on a deed of the 19th November 1867 by which provision was made for the proper maintenance of the Mysore family.

The matter has been frequently before this Court, already points of law having been raised both under the present deed and under other deeds with similar effect. The plaintiff by this deed takes a life interest with remainder to certain other persons. It has been held that this is void by Mahomedan Law. It has also been held under this deed that trusts declared after the life interest are void as gifts to unborn persons. In accordance with this decision I give judgment in favour of the plaintiff in terms of prayers 1, 2, 4 and 5 of the plaint. It has been suggested on behalf of the Official Trustee and the appearing defendant that the whole deed is void, but the failure of the interests subsequent to that in favour of the plaintiff being void, it is not necessary to set aside the whole deed. The cases to which I have been referred are as follows :—*Shahebzadah Mahmud Faradoon Jah* v. *Sahebjadi Fakir Johban Begum* (1), *Sahebzadah Mahomed Abdool Hossain* v. *The Official Trustee of Bengal* (2) and *Sahebzadah Mahomed Mouzzumuddeen* v. *The Official Trustee of Bengal* (3).

The Official Trustee is entitled to his charges and commission, if any due to him, out of the subject-matter of the suit. I give judgment for the plaintiff, accordingly, with costs. The appearing defendants are also entitled to their costs.

Costs to be taxed on scale No. 2.

Attorney for the plaintiff : *N. N. Mitter.*

Attorneys for the defendants : *Gregory and Jones.*

Attorneys for the Official Trustee : *Orr, Dignam & Co.*

B. C. M.

(1) Suit No. 121 of 1907. (Unreported). (2) Suit No. 567 of 1908. (Unreported).
(3) Suit No. 791 of 1901. (Unreported).

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the Deputy Magistrate who had dismissed the complaint under section 203 of the Criminal Procedure Code praying for a revival of his complaint. This Deputy Magistrate rather hesitated to pass any order on this petition, inasmuch as the complainant had already moved the District Magistrate for a further inquiry and the District Magistrate had refused to interfere in the matter. What the Deputy Magistrate says is this :—"If the motion had not been made, I would have passed necessary orders on this petition, but I think, as the present application is after the District Magistrate's order, it should go to him for orders. All I can say is that I see no legal objection to the revival of the case." When the matter was thus referred to the District Magistrate he passed the following order on the 12th August 1908 :—"This matter has nothing to do with me. I have already disposed of the petition of motion which was filed before me. The Deputy Magistrate must act on the petition filed before him according to his own discretion."

It is clear, therefore, that the District Magistrate did not forbid the Deputy Magistrate to take action on the petition for the revival of the complaint. On the contrary, we find that the matter was left entirely in the hands of the Deputy Magistrate who was asked to exercise his own discretion in the matter. There is no doubt that the Deputy Magistrate who had dismissed the complaint under section 203 of the Criminal Procedure Code could legally revive it after dismissal under section 203. The only hitch that there was in the revival was the District Magistrate's order mentioned above, but the District Magistrate himself sent back the application of the complainant for revival to the Deputy Magistrate for him to pass any order that he thought fit and proper.

In these circumstances, we do not think that the Deputy Magistrate's order to revive the complaint was in any way illegal or *ultra vires*. We, therefore, discharge the Rule. Let the record be sent down without delay.

Rule discharged.

E. H. M.

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the Magistrate should first record the grounds of his belief, in terms of the section which was not done. The words "having first recorded the grounds of his belief" in section 25 are mandatory.

The search was not warranted by section 105 of the Criminal Procedure Code, as, in the circumstances of the case, the Magistrate was not acting as a "Court."

The search was not warranted by section 165 of the Criminal Procedure Code: that section does not apply to a Magistrate

Semble: a general search for arms would be governed rather by the provisions of the Arms Act, than by the provisions of the Code of Criminal Procedure.

The search must be taken to have been conducted by the Magistrate in his *executive* and not in his *judicial* capacity, and hence he was not protected by Act XVIII of 1850.

Per Harington and Brett JJ. The issue of a search-warrant by a competent Magistrate is a judicial act.

Hope v. *Evered* (1), *Mahomed Jackariah & Co.* v. *Ahmed Mahomed* (2), and *In re Lakhmidas Naranji* (3) referred to.

APPEAL by the defendant, L. O. Clarke, from the judgment of Fletcher J.

This suit was instituted by Brojendro Kishore Roy Chowdhry, a wealthy and influential zemindar of Mymensingh, for the recovery of the sum of Rs. 10,500 as damages alleged to have been caused by the wrongful trespass of Mr. L. O. Clarke, the District Magistrate of Mymensingh, in searching the plaintiff's cutchery at Jamalpur on the 28th April 1907. Brojendra Kishore Roy Chowdhry was the owner of a 12-annas share in the Gouripur estate in Jamalpur in the district of Mymensingh, the remaining 4-annas share belonging to his mother Sreemutty Bisweswari Debi Chowdhurani, who instituted a similar suit on the same cause of action, the decision of which both in the Court of first instance and on appeal was governed by the judgment in the present action.

It appears that on the 21st April 1907, the annual fair or *mela* was held at Jamalpur. It was alleged that certain Hindus, at the instigation of the Hindu servants of the respondent and other zemindars, tried to prevent the sale of *bideshi* or

(1) (1886) I. R. 17 Q. B. D. 338. (2) (1887) I. L. R. 15 Calc. 109, 141.
(3) (1903) 5 Bom. L. R. 980, 982.

Banamali. The application was granted and the Court ordered that the decree of the lower Court against the other defendants would stand good.

The petitioners, sons and heirs of Bashiram, made an application under section 371 of the Code of Civil Procedure for revival of the appeal on the ground that the petitioners were all minors at the time of the death of Bashiram, one of them having attained the age of 18 years just then, and that as the petitioners were jointly interested with Banamali in the case, there was no necessity for their appearance in the appeal before the agreement between their co-defendant and the plaintiffs which was prejudicial to their interests. The Subordinate Judge rejected the application for restitution of the appeal on all points. The petitioners, thereupon, appealed to the High Court.

Babu Bepin Chandra Mallik (for *Dr Priyanath Sen*), for the appellants. *It was not at all necessary for the legal repre-*sentatives of the deceased defendant to take any steps and join the appeal when they knew that their co-defendant was prosecuting the appeal and attacking the entire decree

No one appeared for the respondent

MOOKERJEE AND CARNDUFF JJ This is an appeal against an order made under section 371 of the Code of Civil Procedure of 1882 read with section 582, refusing to set aside an order of dismissal of an appeal before the Subordinate Judge of Barisal

The circumstances under which the order came to be made may be briefly stated The plaintiffs respondents instituted a suit for rent against three persons, Sridam Chandra Majhi, Bashiram Majhi and Banamali Majhi In the Court of first instance the plaintiffs succeeded, whereupon Bashiram and Banamali, two of the defendants, preferred an appeal to the District Judge of Barisal Upon the hearing of the appeal, the case was decided against the appellants. Shortly after this, one of the appellants, Bashiram died ; the remaining appellant

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officers then drew off the Mahomedan crowd and managed to disperse them.

The Sub-divisional Officer then wired to the Commissioner of the Division for all available armed police, and the District Superintendent of Police sent a telegram to Mymensingh to the appellant, as District Magistrate to the following effect: "serious riot just averted—come at once." The appellant received this telegram at 2 A.M. on the 28th April, and he arrived at Jamalpur at 10 A.M., the same morning.

On his arrival the appellant received from Mr. Barnville, the Sub-divisional Officer, and from Mr. Luffman, the District Superintendent of Police, reports of the occurrences of the 27th April, and he was also informed that the police had reason to believe that fire-arms were stored in the cutcheries. In consequence of this information the appellant determined to search the cutcheries. Without making any record of the reasons for his conduct the appellant, accompanied by Mr. Barniville, Mr. Luffman, and several police and in the presence of certain witnesses proceeded to search the cutcheries of the respondent and of the other zemindars. The temple of Doya Moyee and the cutchery and naib's house of the Ramgopalpur zemindar were first searched: afterwards the cutchery of the plaintiff. At the time, all the buildings and boxes were found locked and no responsible officers of the respondent's cutchery could be found, nor could any keys. The padlocks closing the doors of the building were forced open, the boxes in the cutchery were similarly forced open, and their contents, zemindary papers, taken out in pursuit of the search for arms. The search of the buildings took from 1-30 P.M. to 3-30 P.M. This was the trespass complained of.

The respondent instituted this suit on the 25th July 1907 in the Court of the Third Subordinate Judge of Mymensingh. He alleged that the appellant, accompanied by Mr. Barniville, Mr. Luffman, certain subordinate officers, policemen and Mahomedan rowdies wrongfully and wantonly trespassed into his cutchery, and that in the presence of the appellant and under his orders boxes, chests and almirahs were

namali alone prosecuted the appeal to the High Court, and legal representatives of Bashiram were under the impression t as Bashiram was prosecuting the appeal and challenging validity of the entire decree, it would not be necessary for m to take any steps and join in the appeal. They cannot, refore, be blamed for their omission to take any steps to have mselves brought on the record. But as soon as they covered that Banamali had arranged with the plaintiffs to relieved of all responsibility and had thrown the burden upon m, they applied for leave to revive and prosecute the eal, and in our opinion, they ought to have been allowed do this.

The result, therefore, is that this appeal must be allowed and order of the Court below set aside The appeal will be reed so far as the applicants are concerned and they will be owed to prosecute it before the Subordinate Judge, who will, their instance, now carry out the directions given in the judgnt of this Court in appeal from appellate decree No 1179 of 5.

The appellants are entitled to their costs of this appeal as inst the plaintiffs respondents.

Appeal allowed.

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case, applied as the administratrix of her husband's estate, under sections 244 and 311 of the Civil Procedure Code to have the sale set aside. Thereupon, an agreement had been come to with the decree-holder that if the amount due under the decree were paid the sale would be set aside. Petitions setting forth the terms of the agreement were filed on the 29th June 1907, and there was no stipulation as to the time within which the decretal amount should be paid. On the 22nd July the judgment-debtor filed a petition saying that the parties had agreed to 15 days' time being given for payment. The hearing was adjourned to the 31st July. On the latter date, the judgment-debtor filed another petition setting out an agreement with the decree-holder for 15 days' time for payment, and that it was agreed that if the payment were not made within that time the sale should hold good. On the 15th August the judgment-debtor again applied for time. The application was resisted by the decree-holder. The Court, however, allowed a week's time and permitted the judgment-debtor to deposit part of the decretal amount. The judgment-debtor deposited the remainder of the decretal amount on the 21st August, and applied on the 27th August to have the sale set aside. The decree-holder objected on the ground that the Court had no power to grant time after the 15th August, the parties having agreed that in default of payment on that date, the sale should stand good. The Munsif overruled the objection and set aside the sale. On appeal, the District Judge reversed the orders of the Munsif. The petitioner preferred a second appeal to the High Court.

Mr. A. Caspersz (*Babu Surendra Chandra Sen* with him), for the appellant, contended that time was not the essence of the contract. See, as to the effect of agreement, *Munshi Amir Ali* v. *Inderjit Koer* (1) and *Anant Das* v. *Ashburner & Co.* (2). The decree-holder sold the property in execution. By the agreement, my right to reopen under sections 244 and 311 was abandoned: see *Uttam Chandra Krithy* v. *Khetra Nath*

(1) (1871) 9 B. L. R. 460.

(2) (1876) I. L. R. 1 All. 267.

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to the High Court in its extraordinary original civil jurisdiction to transfer the suit from the Court of the Subordinate Judge of Mymensingh to the High Court for trial, and obtained a rule *nisi*. On the 29th January 1908, an order was passed by Fletcher J. transferring the suitto the High Court to be tried by it in the exercise of its extraordinary original civil jurisdiction.

The suit came on for hearing before Fletcher J. At the trial Mr. Luffman, the District Superintendent of Police, was not called as a witness to prove that the search was necessary to the conduct of an investigation into an offence which he had in hand. Witnesses were called by the plaintiff to speak to the unnecessary violence, alleged to have been resorted to during the search. Against this the defendant's evidence was that only one complaint was made to him, that the police were doing unnecessary damage, and that " he took steps to see to it."

Fletcher J. found that the defendant had acted entirely *bonâ fide*, but that the search of the plaintiff's premises was not warranted by law, and that the defendant's entry constituted an actionable trespass. He accordingly on the 19th June 1908 gave judgment for the plaintiff, allowing him Rs. 500 as damages. His Lordship's judgment was as follows :—

Fletcher J. In this suit the plaintiff, who is a wealthy zemindar in the District of Mymensingh, sues the defendant, who is a member of the Indian Civil Service and was during the month of April 1907 District Magistrate of Mymensingh, to recover damages for an alleged trespass committed by the defendant in searching the plantiff's cutchery at Jamalpur on the 28th of April 1907. The defence raised by the defendant is that he was authorized to conduct the search by Statute. The Statutory provisions relied on by the defendant are (a) the Indian Arms Act, 1878, (b) the Code of Criminal Procedure and (c) Act XVIII of 1850 (" an Act for the Protection of Judicial Officers")

Now the facts relating to the search may be shortly stated as follows :— On the 28th April 1907, the defendant who was then at Mymensingh received in the early morning an urgent telegram from Mr. Barniville, the Sub-divisional Officer, and Mr Luffman, the Head of the Police at Jamalpur, informing him that a riot had narrowly been averted on the previous night. The state of feeling between the Hindus and Mahomedans at Jamalpur had been very intense since the 21st April, but the reasons for the origin of that state are not material to be considered here,

case, applied as the administratrix of her husband's estate, under sections 244 and 311 of the Civil Procedure Code to have the sale set aside. Thereupon, an agreement had been come to with the decree-holder that if the amount due under the decree were paid the sale would be set aside. Petitions setting forth the terms of the agreement were filed on the 29th June 1907, and there was no stipulation as to the time within which the decretal amount should be paid. On the 22nd July the judgment-debtor filed a petition saying that the parties had agreed to 15 days' time being given for payment. The hearing was adjourned to the 31st July. On the latter date, the judgment-debtor filed another petition setting out an agreement with the decree-holder for 15 days' time for payment, and that it was agreed that if the payment were not made within that time the sale should hold good. On the 15th August the judgment-debtor again applied for time. The application was resisted by the decree-holder. The Court, however, allowed a week's time and permitted the judgment-debtor to deposit part of the decretal amount. The judgment-debtor deposited the remainder of the decretal amount on the 21st August, and applied on the 27th August to have the sale set aside. The decree-holder objected on the ground that the Court had no power to grant time after the 15th August, the parties having agreed that in default of payment on that date, the sale should stand good. The Munsif overruled the objection and set aside the sale. On appeal, the District Judge reversed the orders of the Munsif. The petitioner preferred a second appeal to the High Court.

Mr. A. Caspersz (*Babu Surendra Chandra Sen* with him), for the appellant, contended that time was not the essence of the contract. See, as to the effect of agreement, *Munshi Amir Ali* v. *Inderjit Koer* (1) and *Anant Das* v. *Ashburner & Co* (2). The decree-holder sold the property in execution. By the agreement, my right to reopen under sections 244 and 311 was abandoned: see *Uttam Chandra Krithy* v. *Khetra Nath*

(1) (1871) 9 B. L. R. 460. (2) (1876) I. L. R. 1 All 267

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Secondly, the defendant relies upon the provisions of ss 105 and 165 of th Code of Criminal Procedure. Section 105 of the Criminal Procedure Code enacts that a Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant under the provisions of the Code It is obvious in the present case, the defendant was not competent to issue a search warrant under the provisions of the Criminal Procedure Code The defendant was not acting as a "Court" within the meaning of s. 94 of the Criminal Procedure Code as there was no proceeding pending before him.

But then it is said that even if the defendant cannot justify the search under the provisions of s. 105 of the Criminal Procedure Code, yet as he took Mr. Luffman along with him who was making an investigation into the case of Genda, the man who had been wounded on the night of the 27th April, the search can be justified as being a search made by Mr. Luffman.

In my opinion this section will not avail the defendent. I am satisfied on the evidence that the search was not intended to be under the provisions of s 165 of the Criminal Procedure Code The search of the plaintiff's and the other cutcheries was for the purpose of discovering arms generally which s. 165 does not authorize.

In my opinion the search made by the defendant was not, nor was it ever, intended that it should be made under s 165 of the Criminal Procedure Code and I accordingly hold that that section does not justify the defendant's action.

Lastly the provisions of Act XVIII of 1850 ("an Act for the Protection of Judicial Officers") are relied on by the defendant. Such Act provides that no Judge, Magistrate, Justice of the Peace, Collector or other persons acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in discharge of his judicial duty whether or not within the limits of his jurisdiction provided that he acted in good faith.

Now in order that the defendant should bring himself within the provisions of that Statute, it is necessary that the act done or ordered to be done by him should be done or ordered to be done by him in discharge of his judicial duty. What judicial duty was the defendant performing in conducting the search of the plaintiff's premises? In my opinion he was performing no judicial duties at all The defendant as District Magistrate has important duties both executive and judicial cast upon him and the defendant was not, I think, performing any judicial duty in conducting the search of the plaintiff's premises for arms.

In these circumstances, I must hold that the search of the plaintiff's premises by and under the direction of the defendant was not warranted by law. The entry by the defendant into the plaintiff's premises being therefore a trespass, I have to consider before I determine what amount of damages I shall award to the plaintiff whether the defendant was actuated by malice or other improper motives

It cannot be said in this case that the defendant had any feelings of hatred or revenge against the plaintiff with whom he was not acquainted. It has however been argued that the defendant had, in the unfortunate disturbances

give back the auction-purchased property and that consequently a month's time was necessary. The Court, however, did not adjourn the case for a month, and fixed the 29th June as the next date for hearing. On that date the judgment-debtor made another application asking that the case might be adjourned again. This application recited that an agreement had been entered into by the parties to the effect that the sales would be set aside on payment to the decree-holder of the whole amount of the decree with costs, that the judgment-debtor had not been able to collect the necessary money, that she was in difficulty and that she could not raise funds without the permission of the District Judge, apparently because she was in possession of her husband's estate as administratrix. The petition concluded with the statement that if she found herself unable to pay any money to the opposite party, on default of payment the sale would stand good, and she consequently prayed for three weeks' time. The Court thereupon adjourned the case to the 22nd July It should be observed that this exceeded by two days the period of three weeks' time for which the parties had asked, the explanation apparently being that the first day after the three weeks as well as the day following were holidays and the Court adjourned the case to the first open day after the holidays. If this petition be taken as a whole, it may reasonably be contended that no time was fixed for the payment of the money, and that in any event time was not made the essence of the agreement, and this is the view most favourable to the case of the judgment-debtor. On the 22nd July there was again another petition on behalf of the judgment-debtor In this it was stated that the money had not then been raised, that it could be raised only by a mortgage of the properties upon permission of the District Judge, and that in order to enable her to do so, it was necessary to adjourn the case for a further period of 15 days. The petition also recited that on the date fixed the dues would be paid, and on default the sale would stand good. The decree-holder signified his consent to this application in consideration of Rs. 9 paid on that date. The

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paper had been specially delegated to proceed to Jamalpur and report on the state of the disturbances at Jamalpur has graphically described the condition of affairs as he found them at the plaintiff's cutchery on May 1st. I am satisfied on the evidence that the state of affairs at the plaintiff's cutchery on May 1st was the same as it had been left on the conclusion of the search.

It is only fair, however, to the defendant to state that he had no previous experience in conducting a search and that he did not himself enter the cutchery, but relied on the police to conduct the search in a proper manner. But whilst this goes to establish the defendant's *bonâ fides*, it does not release him from the obligation the law casts upon him as being in supreme control of the search party from seeing that the search was conducted in a proper and reasonable manner.

Turning then to the question of damages, I am of opinion that the conduct of the defendant has not been such as the damages to be awarded should be exemplary. But whilst I think that the damages should not be exemplary, I also think that they must be substantial. I am unable to accede to the argument of the learned Counsel for the defendant that the damages in this case should be purely nominal.

Having given the matter the best consideration that I can, I think the justice of the case would be met if I order the defendant to pay to the plaintiff Rs. 500 as damages. The defendant must also pay to the plaintiff his costs of this suit on scale No. 2.

From this judgment the defendant, L. O. Clarke, appealed. There was a cross-objection in which the plaintiff reiterated his charge against the defendant of malice and want of *bonâ fides*: but the cross-objection was not pressed.

Mr. Dunne (*Mr. Gregory* with him), for the appellant. It is not intended to contest the *quantum* of damages, but it is submitted that the Court of first instance was in error in holding that the entry and search constituted an actionable trespass. The principles of common law, regarding trespass on which this suit was decided are not applicable to the present case. The alleged trespass having occurred in the District of Mymensingh, and the suit having come before the High Court in the exercise of its extraordinary original civil jurisdiction, the principles of justice and equity and the rule of good conscience should have been applied: see Letters Patent of 1865, section 20, also *Bhooni Money Dossee* v. *Natabar Biswas* (1). The Court of first instance found as facts, that the defendant had acted *bonâ fide*, and that the circumstances were actually such

(1) (1901) I. L. R. 28 Calc. 452.

money. The decree-holder, however, declined to accept the sum deposited. Subsequently on the 21st August the judgment-debtor put in another application in which it was stated that she had offered the balance to the decree-holder, who had refused to accept the money. The Court thereupon ordered that the applicant might be allowed to deposit the money as prayed for. The money was deposited, and on the 27th August 1907 the Court set aside the sales. The Munsif held in substance that he had jurisdiction to extend the time for payment of the money, and that the execution creditor was bound to accept the sums deposited in Court and to apply the same in satisfaction of his decree. The decree-holder was dissatisfied with these orders and appealed to the District Judge, who has held that the orders cannot be supported. His view in substance is that the application of the 31st July, which was assented to by the decree-holder and confirmed by the Court, embodied an agreement binding upon both parties, that upon breach of that agreement an indefeasible right accrued to the decree-holder to demand that the sale should stand unreversed, and that it was not open to the Munsif, in the exercise of his discretion, to extend the time for the payment of the money due by the judgment-debtor In support of this view the learned District Judge placed reliance upon the decision of this Court in the cases of *Uttam Chandra Krithy* v. *Khetra Nath Chattopadhya* (1) and *Harakh Singh* v. *Saheb Singh* (2).

The judgment-debtor has now appealed to this Court, and on her behalf it has been contended that the District Judge was in error in relying upon the application of the 31st July 1907, and that the agreement which regulates the rights of the parties is to be found embodied in the application of the 29th June 1907. It has also been argued that the effect of this petition, which was assented to by the decree-holder, was to leave it open to the Court to decide what would be a reasonable time within which the judgment-debtor might satisfy the decretal amount. The learned counsel for the appellant has,

(1) (1901) I. L. R. 29 Calc. 577. (2) (1907) 6 C. L. J. 176

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judicial discretion. It was as much a judicial act as the issue of a search warrant, and the issue of a search warrant has been held to be a judicial act: see *Mahomed Jackariah & Co.* v. *Ahmed Mahomed* (1) and *In re Lakhmidas Naranji* (2).

Mr. Garth (*Mr. A. Chaudhuri* with him), for the respondent. The Common Law of England has been held by Indian Courts to be the standard of justice, equity and good conscience: see *Waghela Rajsanji* v. *Sheikh Masludin* (3). The search by the appellant was *prima facie* a trespass, and he would be liable in an action, unless he could justify the act as being warranted by law. Protection under section 25 of the Arms Act of 1878 can only be claimed for acts done in strict conformity with the terms in which the special power is conferred by the legislature. The provision "having first recorded the grounds of his belief" is imperative and mandatory: see Maxwell on the Interpretation of Statutes, 4th edition, page 556, and *The Queen* v. *Pindar* (4). Under section 165 of the Criminal Procedure Code, a search in the conduct of an investigation can be made only by a police officer and not the District Magistrate. Police officers are not within the control and jurisdiction of the District Magistrate, but of the Inspector-General. From section 105 of the Code, read with sections 94 and 96, it is clear that a Magistrate is not competent to issue a search-warrant, unless he is sitting as a Court, and there is some enquiry or proceeding pending before him: see *In re Harilal Buch* (5) and *Mouli Durzi* v. *Naurangi Ali* (6). In the circumstances of this case the Magistrate had no jurisdiction to issue a search-warrant or make a search. The appellant was not protected by Act XVIII of 1850, as the search was a purely executive and not a judicial act: see *Queen Empress* v *Arumugam* (7) and *Chander Narain Singh* v. *Brojo Bullub Gooie* (8).

Mr. Dunne, in reply.

Cur. adv. vult.

(1) (1887) I. L. R. 15 Calc. 109, 141.
(2) (1903) 5 Bom. L. R. 980, 982.
(3) (1887) I. L. R. 11 Bom. 551, 561.
(4) (1855) 24 L. J. Q. B. 148.
(5) (1897) I. L. R. 22 Bom. 949
(6) (1900) 4 C. W. N 351.
(7) (1897) I. L. R. 20 Mad. 189
(8) (1874) 21 W. R. 391.

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July? Time had previously been repeatedly granted by the Court at the instance of the judgment-debtor with the consent of the decree-holder. On the 31st July the judgment-debtor prayed for further time, the decree-holder insisted, not unreasonably, upon more stringent terms and demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that, upon her failure to pay the money on the date to be fixed, her right to challenge the validity of the sale should finally cease. The judgment-debtor consented, and the Court sanctioned this arrangement. We need not, therefore, consider what the position of the parties would have been, if the arrangement proposed by the parties on the 31st July had not been approved by the Court; possibly it might then have been open to the Court to proceed on the footing of the original application of the 29th June and exercise its jurisdiction accordingly. But after the Court had sanctioned the arrangement entered into by the parties on the 31st July, the Court could not, in our opinion, subsequently at the instance of the judgment-debtor and in spite of the protest of the decree-holder, vary the terms of the agreement. This is clear from the decision of this Court in *Harakh Singh* v *Saheb Singh* (1) already referred to As the learned vakil for the respondent contended, there were three parties to the agreement, the decree-holder, the judgment-debtor, and the Court, and, once the agreement had resulted from their concurrence, it could not be subsequently modified except by the assent of each and every one of them. That was not done in this case We must, therefore, hold that the orders of the Munsif made on the 15th August 1907, permitting the judgment-debtor to deposit Rs 150 on that date to the credit of the decree-holder and also allowing her time to put in the balance of the decretal money on the 21st August, were made without jurisdiction. The learned counsel for the appellant, however, contended that if this view be adopted, the decree-holder ought to have immediately preferred an appeal against these orders. In our opinion,

(1) (1907) 6 C L J 176.

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the state of feeling between the Hindus and Mahomedans at that time. Unless the search were warranted by some Statute, the defendant had no right to make it; and the question we have to decide is whether the defendant is protected, in other words, was he acting and did he act under any, and if so, what power conferred upon him by law. The plaintiff has charged the defendant with having acted maliciously and without reasonable and probable cause in making the search. I have no hesitation in saying that there is no ground whatever for charging the defendant with malice, nor any hesitation in saying that the defendant acted in perfect good faith in making the search that he did.

It will, perhaps, be convenient, in the first place, to deal with section 25 of the Indian Arms Act, 1878, upon which the defendant relies. That section runs as follows:—" Whenever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace, such Magistrate, *having first recorded the grounds of his belief*, may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms, ammunition or military stores are, or is, to be found, and may seize and detain the same, although covered by a license in safe custody, for such time as he thinks necessary. The search in such case shall be conducted by, or in the presence of, a Magistrate, or by, or in the presence of, some officer specially empowered in this behalf by name, or in virtue of his office, by the Local Government." The search was undoubtedly a general search for arms, not, as is now suggested at the Bar, for the revolver, with which Genda Sheikh had been wounded. It is conceded that the defendant before making the search did not *record the ground of his belief*. The question then is whether, not having complied with the terms of the Statute, the defendant can justify the search under that section. It is contended for him that the words " having first

ORIGINAL CIVIL.

Before Mr. Justice Stephen.

MAHOMED SHAH

v.

OFFICIAL TRUSTEE OF BENGAL.*

1909
Jan. 25.

Mahomedan Law—Trust deed—Life interest with remainder over—Gift to unborn persons

A deed creating a life interest with remainder over is void under the Mahomedan Law. Similarly a gift to unborn persons is void

Shahebzadah Mahmud Faradoon Jah v *Shahebjadi Fakir Johban Begum* (1), *Shahebzadah Mahomed Abdool Hossain* v. *The Official Trustee of Bengal* (2), and *Shahebzadah Mahomed Mouzzumuddeen* v *The Official Trustee of Bengal* (3) followed.

ORIGINAL SUIT.

THIS was a suit brought by the plaintiff, Shahebzadah Mahomed Mahmud Shah, a member of the Mysore family and a beneficiary under the Mysore Trust Deed, dated the 19th November 1867, for construction of that deed and to have it declared that he was the absolute owner of certain promissory notes for Rs 37,500, now in the custody of the Official Trustee.

Under this deed, these promissory notes were given to the Official Trustee in trust to pay the income to the plaintiff during his life and after his death to his widow and children in certain shares The plaintiff had one issue, a son, named Mahomed Behroze Shah, who together with the plaintiff's wife, Shahebzadee Noorunnessa Begum, were made party defendants to the suit. At the time the Trust Deed was executed the plaintiff had no children. The Official Trustee left the construction of the deed to the Court.

Mr. L. P E. Pugh and *Mr N. N. Sircar*, for the plaintiff.

Mr. Hyam, for the defendants Shahebzadee Noorunnessa Begum and Shahebzadah Mahomed Behroze Shah

* Original Civil Suit No 567 of 1908.

(1) Suit No 121 of 1907. (Unreported). (2) Suit No 567 of 1908. (Unreported). (3) Suit No. 791 of 1901. (Unreported.)

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the state of feeling between the Hindus and Mahomedans at that time. Unless the search were warranted by some Statute, the defendant had no right to make it; and the question we have to decide is whether the defendant is protected, in other words, was he acting and did he act under any, and if so, what power conferred upon him by law. The plaintiff has charged the defendant with having acted maliciously and without reasonable and probable cause in making the search. I have no hesitation in saying that there is no ground whatever for charging the defendant with malice, nor any hesitation in saying that the defendant acted in perfect good faith in making the search that he did.

It will, perhaps, be convenient, in the first place, to deal with section 25 of the Indian Arms Act, 1878, upon which the defendant relies. That section runs as follows:—"Whenever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace, such Magistrate, *having first recorded the grounds of his belief*, may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms, ammunition or military stores are, or is, to be found, and may seize and detain the same, although covered by a license in safe custody, for such time as he thinks necessary. The search in such case shall be conducted by, or in the presence of, a Magistrate, or by, or in the presence of, some officer specially empowered in this behalf by name, or in virtue of his office, by the Local Government." The search was undoubtedly a general search for arms, not, as is now suggested at the Bar, for the revolver, with which Genda Sheikh had been wounded. It is conceded that the defendant before making the search did not *record the ground of his belief*. The question then is whether, not having complied with the terms of the Statute, the defendant can justify the search under that section. It is contended for him that the words "having first

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington, and Mr. Justice Brett

L. O. CLARKE
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1909
Jan. 12

Trespass—Bonâ fides—Search for arms by Magistrate, whether executive or judicial act—Protection of Judicial Officers Act (XVIII of 1850), s. 1—Statutory powers of Executive Officers, how to be exercised—Indian Arms Act (XI of 1878), s. 25—Provision "having first recorded grounds of his belief," whether mandatory or directory—Criminal Procedure Code (Act V of 1898), ss. 94, 96, 105, 106, 165—Search-warrant—Magistrate as "Court"—Search by police officer—Police Act (V of 1861), s. 1—Powers of District Magistrate—Letters Patent of 1865, s. 20—Extraordinary original civil jurisdiction of High Court

For some time previous to the 27th April 1907, there had been a considerable tension of feeling between the Hindus and Mahomedans at Jamalpur, in the District of Mymensingh. On the 27th April a Mahomedan was shot by a Hindu, and a serious conflict was narrowly averted by the Subdivisional Officer and the District Superintendent of Police. On the arrival of the District Magistrate in Jamalpur, on the morning of the 28th April, he received reports from the two Officers of the occurrences of the 27th April, and he was also informed that the police had reason to believe that fire-arms were stored in certain cutcheries belonging to Hindu zemindars. In consequence, the District Magistrate accompanied by the District Superintendent of Police proceeded to search the cutcheries. Under the orders of the District Magistrate, the cutchery of the respondent was forcibly entered, boxes forced open, and search made. On an action instituted against the District Magistrate for trespass, it was found as a fact that he had acted with perfect *bonâ fides*:—

Held (Brett J. dissenting), that according to the principles of equity, justice and good conscience, the search constituted an actionable trespass unless warranted by some Statute, and in the circumstances of the case, the search was warranted by no Statute. When Executive Officers are invested with Statutory powers of a special and drastic nature, before exercising those powers, they must strictly comply with the provisions of the Act which created them.

The search being a general search for arms, was not warranted by section 25 of the Arms Act of 1878, which required that before making the search,

* Appeal from Original Civil, No. 36 of 1908

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MACLEAN C.J.

treated as having been made under that section, and the defendant can so shelter himself. The answer to this contention seems to be that the search was not, and was never, intended to be a search under this section, and the search was not by Mr. Luffman or by any police officer making an investigation: it was a search conducted by, and under the directions of, the Magistrate. Mr. Clarke says so himself. He says "I thought I was justified in making the search myself" and "I did want to make the search myself." It must, I think, be taken that the search was by him. Mr. Luffman was not called to prove that this was a search under this section, or that he was exercising the powers conferred upon him by this section. Mr. Luffman did not go into the box. Section 165 does not mention the Magistrate. Where there are special provisions in an Act of the Legislature dealing with the case of a search for Arms, and laying down what are the conditions precedent to making such a search, and there are general provisions in another Act of the Legislature dealing with searches generally, and in point of fact the search is one made for arms, it ought, in the absence of evidence, to show that the search was made under the general as opposed to the specific legislation, to be taken that the search was made, not under the general provisions authorizing searches, but under the special provisions authorizing a search for arms, and especially so when the search is made by one who, in the circumstances had no power of search under the general provisions as to searches. Nothing is specifically said about arms under section 165, and that section does not appear to protect the defendant.

The scheme as regards searches under the Code of Criminal Procedure is reasonably clear. The Court can issue a search warrant under section 96, or in lieu of that the Magistrate may himself search under section 105; section 165 deals with searches by a police officer, and not by a Magistrate.

The only other Act relied upon is Act XVIII of 1850. The preamble of that Act is "for the greater protection of Magistrates and others acting *judicially*" and there is only one section which runs as follows :—"No Judge, Magistrate, Justice

foreign goods at this fair, in furtherance of the "boycott" movement, which had been established in Jamalpur. The Mahomedans resented this interference, and a serious disturbance ensued, the feelings of the Mahomedans towards the Hindus being considerably embittered It was alleged that Pursa Nath Sen and Satish Chandra Banerji, the Superintendents of the plaintiff and his mother, residing in their respective cutchery premises were chiefly responsible for the disturbance. On the evening of the 27th April at about 9-30 P.M., a Mahomedan named Genda was shot with a revolver. Mr. *Barniville, Sub-divisional Officer of Jamalpur, and Mr. Luffman*, District Superintendent of Police, who were then in the Inspection Dak Bungalow, on hearing the sound of three or four shots proceeded to the scene of disturbance and met some Mahomedans carrying away the wounded man. The officers were informed that the persons concerned in the shooting were certain Hindus, who had fled to and taken refuge in the zemindary cutcheries The zemindary cutchery premises of the respondent and his mother, those belonging to the Ramgopalpur Estate, and the Doya Moyee temple buildings were all situated close together on an open piece of ground. The two officers, with a body of policemen with a view to arresting the men, proceeded towards the cutcheries, near which an excited mob of Mahomedans armed with *lathis* had already collected. The officers entered the cutchery premises, and arrested four Hindu strangers there on suspicion They also found in the cutchery Satish Chandra Banerji with forty or fifty men armed with *lathis*, whom they induced to lay down their arms They were then informed that armed men were concealed in the adjoining temple of Doya Moyee, and proceeded there. The door was locked and they were refused admission. The Sub-divisional Officer ordered the persons inside to open the door, promising that no harm should be done to them. A large angry crowd of Mahomedans were assembled close by, but they appear to have been under control. The door was not opened, but four shots were fired from inside the temple and a Mahomedan was wounded. The two

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treated as having been made under that section, and the defendant can so shelter himself. The answer to this contention seems to be that the search was not, and was never, intended to be a search under this section, and the search was not by Mr. Luffman or by any police officer making an investigation: it was a search conducted by, and under the directions of, the Magistrate. Mr. Clarke says so himself. He says "I thought I was justified in making the search myself" and "I did want to make the search myself." It must, I think, be taken that the search was by him. Mr. Luffman was not called to prove that this was a search under this section, or that he was exercising the powers conferred upon him by this section. Mr. Luffman did not go into the box. Section 165 does not mention the Magistrate. Where there are special provisions in an Act of the Legislature dealing with the case of a search for Arms, and laying down what are the conditions precedent to making such a search, and there are general provisions in another Act of the Legislature dealing with searches generally, and in point of fact the search is one made for arms, it ought, in the absence of evidence, to show that the search was made under the general as opposed to the specific legislation, to be taken that the search was made, not under the general provisions authorizing searches, but under the special provisions authorizing a search for arms, and especially so when the search is made by one who, in the circumstances had no power of search under the general provisions as to searches. Nothing is specifically said about arms under section 165, and that section does not appear to protect the defendant.

The scheme as regards searches under the Code of Criminal Procedure is reasonably clear. The Court can issue a search warrant under section 96, or in lieu of that the Magistrate may himself search under section 105; section 165 deals with searches by a police officer, and not by a Magistrate.

The only other Act relied upon is Act XVIII of 1850. The preamble of that Act is "for the greater protection of Magistrates and others acting *judicially*" and there is only one section which runs as follows:—"No Judge, Magistrate, Justice

forcibly, wantonly and wrongfully broken open, and the contents thereof, valuable zemindary papers and documents were scattered, destroyed and mutilated: he charged the appellant with acting wrongfully, maliciously, without any lawful or reasonable justification or authority, and without any reasonable or probable cause: and he submitted he had suffered great insult, injury and humiliation, and been put to great inconvenience and difficulty owing to the loss and destruction of his zemindary documents, assessing his damages at Rs. 10,500.

Mr. L. O Clarke in his written statement, filed on the 9th November 1907, contended that the search of the 28th April 1907 was justifiable and necessary, inasmuch as he had reason to believe that arms were in the possession of Pursa Nath Sen and Satish Chandra Banerji for unlawful purposes, in the cutchery premises occupied by them, and that they could not be left in possession of the same without danger to the public peace, and that the production of such arms was, in his opinion and in the opinion of the Superintendent of Police, necessary and desirable for the purposes of an investigation then being made by the Superintendent of Police. He alleged that he and the Superintendent of Police directed a search for arms to be made in his presence and under the conduct of the Superintendent of Police, and nothing more was done, nor damage caused beyond what was necessary and unavoidable in order to obtain admittance and access for the purpose of the search. The defendant contended that as District Magistrate, he acted under and by virtue of the powers conferrerd upon him by sections 94, 96, 105 and 165 of the Criminal Procedure Code, and in the alternative by section 25 of the Indian Arms Act, 1878, and claimed protection under the Act for the Protection of Judicial Officers (Act XVIII of 1850), as having acted judicially and in the discharge of a judicial duty.

On the 26th November 1907, the defendant applied to the District Judge of Mymensingh for the transfer of the suit for trial from the Court of the Subordinate Judge to that of the District Judge. On the 3rd January 1908, the plaintiff applied

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importance, in the interests of the public, that when Executive Officers are invested with statutory powers of a special and drastic nature, they ought to be very cautious, before exercising those powers, in satisfying themselves that they have strictly complied with the provisions of the Act which created them.

It is said that we must decide this case, not according to the Law of Trespass prevailing in England, but upon the principles of equity, justice and good conscience. But how can those principles justify an Executive Officer of the Government in forcibly entering another man's house and ransacking its contents without any warrant in law to do so ? In the view taken it becomes unnecessary to go into the question of whether the search was properly conducted or whether too much violence was or was not displayed, for, at the outset Mr. Dunne said that he did not propose to go into question of the *quantum* of damages.

There is a cross-objection in which the plaintiff re-iterated his charge against the defendant of malice and want of *bonâ fides*. This cross-objection has not been pressed.

The result then is that the appeal is dismissed; but having regard to the re-iteration of the unfounded charges against the defendant, it will be dismissed without costs, and the cross-objection will also be dismissed without costs.

This judgment will govern the next appeal No. 37 of 1908 and the same order will be made in that case.

HARINGTON J. In this case the defendant appeals against a judgment of this Court in its original jurisdiction awarding to the plaintiff Rs. 500 damages for trespass.

The defendant was in April 1907 District Magistrate of Mymensingh: on the 27th of that month—there being very considerable ill-feeling between the Mahomedans and Hindus—a Mahomedan was shot at Jamalpur. On the 28th the defendant arrived at Jamalpur and was informed of the shooting of the Mahomedan and that fire-arms had also been used by some

forcibly, wantonly and wrongfully broken open, and the contents thereof, valuable zemindary papers and documents were scattered, destroyed and mutilated: he charged the appellant with acting wrongfully, maliciously, without any lawful or reasonable justification or authority, and without any reasonable or probable cause: and he submitted he had suffered great insult, injury and humiliation, and been put to great inconvenience and difficulty owing to the loss and destruction of his zemindary documents, assessing his damages at Rs. 10,500.

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I do not agree with this, and I think that where a Statute authorizes the doing of an act, which is *primâ facie* a wrong to an individual, the doer must comply strictly with the conditions imposed by the Statute, if he desires to rely on the Statute as a justification for his act. He cannot claim as against the individual, who is injured by his act, the protection of the Statute, unless he strictly complies with the conditions, on which the Statute affords that protection.

Here the section imposes on the Magistrate in the most express terms the duty of first recording the grounds of his belief that arms are in the possession of the person, whose house is to be searched. It makes it in the most express terms a condition precedent and to justify his entry the condition must be strictly complied with. As there was a failure to comply with this condition the Arms Act will not avail the defendant.

The next section, under which it is sought to justify the appellant, is section 165 of the Criminal Procedure Code. That section provides that "whenever a police officer making an investigation considers that the production of anything is necessary for the conduct of an investigation of any offence, which he is authorized to investigate, and when such thing is not known to be in the possession of any person, such officer may search or cause the search to be made for the same within the limits of the station, of which he is in charge or to which he was attached."

I quite agree with the argument that (apart from any question of the user of undue violence), if the search by the police officer can be justified under this section, then the defendant must succeed, for, if the police officer committed no trespass in entering and searching, then the defendant committed no wrong in authorizing the police officer to do that which the law gave him a right to do.

But this case was not set up in the Court of first instance nor was any evidence given to support it. To succeed the defendant would have to prove that the police officer, who made the search, considered that the production of something was necessary for the conduct of his investigation into an offence, which

Upon receipt of the telegram above-mentioned the defendant started for Jamalpur and arrived there at 10 o'clock in the morning On his arrival he was informed by Mr. Luffman of the fact that a man named Genda Shaik had been wounded on the previous evening by a shot fired from a revolver or a gun and that the police had heard that the zemindars had been storing fire-arms in their cutcheries

Upon receipt of this information the defendant determined to search the cutcheries of certain zemindars in the district including the plaintiff's cutchery and having summoned certain gentlemen to be witnesses of the search, he proceeded on the afternoon of the 28th April to search the cutcheries accompanied by Mr. Barniville, Mr Luffman and a number of police and the witnesses to the search The plaintiff's cutchery was searched between 3 and 4 in the afternoon and it is with regard to this search that the plaintiff seeks to recover damages in this suit The defendant admits the fact of the search and that it was done by his orders and under his directions, but pleads that he was authorized to conduct the search by virtue of the provisions of the Statutes above-mentioned

Now the general rule of the common law is that a Magistrate is liable in an action of trespass for acts done by him to the persons or property of others unless he can justify the act as having been done under the authority of the law. And if a Magistrate pleads a Statute or Statutes as justifying his acts he must bring himself within the words of the Statutes strictly

It becomes necessary therefore, in the first place, to consider the statutory provisions relied on by the defendant as authorising the search

The first of these statutory provisions section 25 of the Indian Arms Act, 1878, is in the following terms :—

"Whenever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition, or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace, such Magistrate having first recorded the grounds of his belief may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms, ammunition or military stores are or is to be found, and may seize and detain the same although covered by a license and keep in safe custody for such time as he thinks necessary The search in such case shall be conducted by or in the presence of a Magistrate or by or in the presence of some officer specially empowered in this behalf by name or in virtue of his office by the local Government" The defendant admits in the present case that he did not before causing the search to be made first record the grounds of his belief as provided by section 25 of the Arms Act He says he had no copy of the Arms Act with him although he admits he could have obtained one from the Sub-divisional Officer in a few minutes.

In these circumstances, the defendant not having complied with the provisions of that Statute cannot justify the search under the provisions of the Indian Arms Act.

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The present appeal arises out of a suit brought by the plaintiff, Babu Brojendra Kishore Roy Chowdhry, a zemindar in the District of Mymensingh, who has his zemindari cutchery at Jamalpur in that District, against Mr. L. O. Clarke, who on the 28th April 1907, was District Magistrate of the Mymensingh District. The suit was brought to recover damages to the amount of Rs. 10,500 for wrongful trespass in the cutchery of the plaintiff by the defendant on the 28th April 1907. The plaint alleged that on the 28th April the defendant with the Sub-divisional Officer of Jamalpur, Mr. Luffman, District Superintendent of Police, a Sub-Inspector of Police and the Sub-Registrar followed by a large number of armed police men and a large number of Mahomedan rowdies carrying lathis and other dangerous weapons wrongfully invaded and trespassed in the plaintiff's cutchery, and there, under orders of the defendant, those who accompanied him forcibly, wantonly and wrongfully broke open and smashed boxes in the cutchery, scattering, destroying and mutilating various valuable zemindari papers and documents. It went on to say in paragraph 6 that "the defendant acted in a whole illegal, wanton and arbitrary manner and he had no lawful or reasonable excuse or justification or authority in or for his wanton and high-handed conduct aforesaid, and the plaintiff further charges that the defendant acted wrongfully and maliciously and without reasonable cause in the matter of the conduct aforesaid." Damages were claimed (see paragraph 7 and the schedule) (1) for insult, injury and humiliation at Rs. 8,000, (2) for damages done to the houses at Rs. 200, (3) damages to moveables at Rs 300 and (4) damaged or lost papers and documents at Rs. 2,000. Under the 1st item appears to have been included a claim for rents, which in consequence of the search the plaintiff said he had been unable to realise from his tenants.

The suit was instituted on the 25th July 1907 in the Court of the Subordinate Judge (3rd Court) of Mymensingh. On the 26th November 1907, the defendant applied to the District Judge of Mymensingh for the transfer of the suit for trial from

which had arisen between the Hindus and Mahomedans at Jamalpur, taken the side of the Mahomedans and that the search on the 28th April 1907 was really conducted by the defendant owing to the improper feelings that he held against the Hindus at Jamalpur generally. In support of this it is alleged that as the defendant when he arrived at Jamalpur on the morning of April 28th was aware that the Mahomedans had previously announced by beat of drum that the Government had given them permission to loot the the Hindus' property and marry their widows in *Nika* form and that a large number of the Hindus were fleeing from the place in a state of panic, if the defendant had honestly done his duty he would in the first place have tried to restore confidence to the Hindus by assuring them of the impartiality of the Government.

It may be that a man of wider experience or riper judgment would have done so, but even if I were to assume that this was the primary duty of the defendant this allegation against the defendant only comes to this, namely, that he committed an error of judgment The defendant was severely cross-examined by the learned Counsel for the plaintiff and I am satisfied from what I have heard in this case that the defendant in determining upon the search that was made on the 28th April 1907 was acting *bond fide* and was not actuated by malice or other improper motives against any particular individual or section of the community.

But whilst I find that the defendant was not actuated by malice I cannot absolve the defendant with regard to one matter, namely, that the defendant failed to exercise proper supervision and control over the people under him conducting the search Now what are the facts relating to the actual search itself? By the time the defendant and the searching party reached the plaintiff's cutchery, the cutcheries of three other zemindars and a Hindu temple had been previously searched without finding anything suspicious. In these circumstances one would have thought that the plaintiff would have then doubted whether the information given to him by the police was correct and would have proceeded with great circumspection, the more especially so, as he admits that at the search of one of the cutcheries previously searched a complaint had been made to him by a Hindu gentleman who was accompanying the search party as to the method in which the search was being conducted. What then are the facts relating to the actual search of the plaintiff's cutchery? The servants of the plaintiff (except one Safatulla, a Mahomedan, who had charge of the keys of the cutchery and who was not on the premises when the defendant and the search party arrived) having fled owing to the panic, it became necessary for the search party to break open the outer door of the cutchery. Having thus effected an entrance some of the Mahomedan mob which had collected and were accompanying the search party were requisitioned to go and bring *daos*, and assist in opening the boxes which contained the zemindary papers That the search was conducted with unnecessary damage to the property of the plaintiff cannot to my mind be doubted for an instant The papers out of various boxes in the cutchery were strewn haphazardly on the floor of the cutchery Mr Horniman of the "Statesman" newspaper who accompanied by Mr Newman of the "Englishman" news-

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from the map filed in the suit to be all close together on an open piece of ground. Close by is the temple of Thakurani Doya Moyee. An excited crowd of Mahomedans armed with lathis were collecting evidently bent on attacking the cutcheries. The two officers collected as many police as they could, but went towards the cutcheries with apparently the double intention of arresting the man or men, who had fired on the Mahomedans and wounded Genda and also of keeping the Mahomedan mob under control. On arrival at the cutchery they found four Hindu strangers there, whom they arrested on suspicion. They also found Satish Chandra Banerjee with forty or fifty men armed with lathis in the cutchery. These they disarmed. They were then informed that armed men were concealed in the adjoining temple of Doya Moyee and went there. They found the door locked and were refused admission. The Sub-divisional Magistrate ordered the persons inside to open the door, promising that no harm should be done to the persons inside. There was then a large angry crowd of Mahomedans close by, but they seem to have been under control. *The door was not opened, but two shots from a* revolver and two from a shot gun were fired from inside the temple and a Mahomedan received a shot wound. The two officers then drew off the Mahomedan crowd and managed to disperse them.

The Sub-divisional Officer, Mr. Barniville, then wired to the Commissioner of the Division for all available armed police, and the District Superintendent of Police, Mr. Luffman, sent a telegram to Mymensingh to the defendant as District Magistrate to the following effect "serious riot just averted—come at once."

The defendant received this telegram at 2 A.M. on the morning of the 28th April. He afterwards started for Jamalpur and arrived there at 10 A.M.

On his arrival the defendant received from Mr. Barniville, the Sub-divisional Magistrate, and from Mr. Luffman, Superintendent of Police, reports of the two occurrences of the 27th April.

as to justify the defendant as District Magistrate in making a search for arms. The mere technical omission to record his reasons cannot be held, in accordance with the principles of justice and equity and the rule of good conscience, to be sufficient to convert what would otherwise have been a justifiable act into an actionable wrong. To hold otherwise, would paralyze the action of Magistrates in moments of emergency. The entry and search were justifiable under section 25 of the Arms Act of 1878. The words in the section "having first recorded the grounds of his belief," when read in the light of the object of the section—the preservation of the public peace—must be taken to be directory and not imperative or mandatory: see Maxwell on the Interpretation of Statutes, 4th edition, page 556, and Craies on Statute Law, 4th edition, page 232, citing, *The Liverpool Borough Bank* v. *Turner* (1) and *Howard* v. *Bodington* (2). The District Magistrate was also protected in making the entry and search under the provisions of the Criminal Procedure Code. The search of the 28th April was not only a general search for arms, but also a search for the arms employed in the commission of the two offences on the 27th April. Under section 165 of the Criminal Procedure Code the District Superintendent of Police had full power to search the premises of the respondent for the arms with which the offences were committed as necessary for the conduct of the investigation into the offences. It follows that the appellant committed no actionable wrong in authorising the Superintendent to do that which the law gave him a right to do. Moreover, under section 4 of Act V of 1861, powers of general control and direction over the police within his local jurisdiction are given to the District Magistrate. Also under the Code the District Magistrate was competent to issue a search warrant, and he had power to direct or make the search under section 105 read with sections 94 and 96, although no proceeding was pending before him. Lastly the appellant was entitled to protection from suit under the Protection of Judicial Officers Act being Act XVIII of 1850. The search by the District Magistrate involved the exercise of

(1) (1861) 30 L. J. 379, 380. (2) (1877) L. R. 2 P. D. 203, 211.

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165 of the Criminal Procedure Code or (2) in the alternative that he was acting under the powers conferred upon him by section 25 of the Indian Arms Act, or (3) in the alternative that he was acting in discharge of a judicial duty and within the limits of his jurisdiction and that he at the time believed himself to have (as he submits he had in fact) jurisdiction to do or order the acts done or ordered by him and therefore that he was protected by Act XVIII of 1850, being the Act for the Protection of Judicial Officers. Further, he alleged that the damages claimed were excessive. The written statement, it is to be observed, was filed in the Court of the Subordinate Judge of Mymensingh on the 9th November 1907.

Evidence was gone into by both parties and judgment was delivered by Mr. Justice Fletcher on the 19th June 1908. The learned Judge held that the defendant in determining to make the search on the day in question in the plaintiff's cutchery was acting *bonâ fide* and was not actuated by malice or other improper motives against any particular individual or section of the community. On the other hand, he held that the search of the plaintiff's premises by the defendant was not warranted by law and so constituted an actionable trespass. In arriving at this conclusion the learned Judge applied the principle of the Common Law in England, which he regarded as applicable to the case, that a Magistrate is liable in an action for trespass for acts done by him to the person or property of others, unless he can justify the act as having been done under the authority of law, and that if a Magistrate pleads a Statute or Statutes as justifying his acts, he must bring himself within the words of the Statutes strictly.

Applying that principle he held that the defendant had failed to justify his act under the Arms Act of 1878, as the provisions of section 25 of that Act require that before causing a search to be made under the Act, the Magistrate should first record the grounds of his belief that the person, whose premises he was about to search, had in his possession any arms, ammunition or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms,

MACLEAN C.J. *The plaintiff is a zemindar residing in* the District of Mymensingh. The defendant is a member of the Indian Civil Service, and, at the date of the transaction in question, was District Magistrate of Mymensingh. The plaintiff seeks to recover damages for a trespass alleged to have been committed by the defendant in searching the plaintiff's cutchery at Jamalpur on the 28th of April 1907. The defendant, in substance, pleads not guilty by Statute and relies upon the Statutes to which reference will be made later on

The facts appear to be these :—For sometime previous to the 28th of April 1907 the state of feeling between the Hindus and Mahomedans at Jamalpur ran very high, and there can be no doubt but that for some days the town had been in a condition of very great excitement. On the 28th of April 1907, the date of the search which undoubtedly took place on the afternoon of that day the defendant was at Mymensingh; and in consequence of a telegram, which he received from Mr Barniville, the Sub-divisional Officer, and Mr Luffman, the Head of the Police at Jamalpur, he left for Jamalpur and arrived there at about 10 o'clock in the morning He was then informed by Mr Luffman that on the previous evening a man named Genda Sheikh had been wounded by a revolver shot; and he was also informed that the police had reason to believe that fire-arms were stored in the cutcheries of the zemindars. In consequence of this information the defendant determined to search, amongst others, the plaintiff's cutchery; and in the presence of certain gentlemen as witnesses of the search and accompanied by Mr. Barniville, Mr Luffman and several police, he searched the plaintiff's cutchery in the afternoon This is the trespass complained of. It is unnecessary to go more in detail into the facts of this part of the case, because there is no dispute as to the facts stated above. The fact of the search and that it was conducted by the order and under the directions of the defendant is not denied. It seems, therefore, unnecessary to discuss what took place on the evening of the 27th of April or to go more minutely into the question of the excitement or the cause of the excitement and

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On these findings the learned Judge arrives at the conclusion that the search of the plaintiff's premises by and under the direction of the defendant was not warranted by law and therefore amounted to a trespass.

In dealing with the question of damages the learned Judge holds that the defendant did not himself enter the cutchery to make the search, but relied on the police to conduct it in a proper manner, and that, though this goes to establish the defendant's *bonâ fides* it does not release him from the obligation, which the law casts on him as being in supreme control of the search party, from seeing that the search was conducted in a proper and reasonable manner. He entertains no doubt that the search was conducted with unnecessary damage to the property of the plaintiff, relying apparently in support of this view mainly on the evidence of Mr. Horniman, and holds that the defendant failed to exercise proper supervision and control over the people under him conducting the search. Being of opinion on this finding that though the damages should not be exemplary they should be substantial, he awards that plaintiff Rs. 500 as damages against the defendant.

The defendant has appealed.

The learned Counsel for the appellant, who has placed the case before us, has laid great stress from the outset on the remarkable contrast which is presented by the case as held by the learned Judge to have been proved against the defendant and that as set out in the plaint, and has argued that the acts of the defendant and those, who carried out his orders, have been grossly distorted and the damage done exaggerated enormously. No attempt was in fact made to prove the alleged loss of rents from the tenants as a damage consequential on the search, after the plaintiff's agent had been obliged to admit that in the preceding year an attempt had been made by the plaintiff to raise the rents of his tenants, more than 90 per cent. of whom are Mahomedans, which had been resisted and had created general discontent. The plaint averred against the defendant that he had committed a

recorded the grounds of his belief," are merely directory and not imperative or mandatory. It is difficult to accept this view. A special and drastic power is by this section granted to the Magistrate. Without it, he could not have made the search, unless, as it is suggested, certain provisions of the Criminal Procedure Code apply to a case such as the present. These words must have been inserted in the section with an object and the object probably was to protect the public against searches being inconsiderately directed and to insure the exercise of deliberation by the Magistrate before he ordered the search. A fine distinction is often drawn between what is *mandatory* and what is merely *directory* in the language of any particular Statute The present case appears to fall within that class of cases in which, when a Statute creates a special right, but certain formalities have to be complied with antecedent to the exercise of that right, a strict observance of the formalities is essential to the acquisition of the right. As the defendant, in the case now before us, did not comply with the required formality by recording the grounds of his belief before he proceeded to search, this section does not appear to protect him from the consequences of his action.

Then it is said that the search was warranted by section 105 of the Criminal Procedure Code. That section runs as follows: "Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant." The Magistrate can only act under this section where he is competent to issue a search-warrant. That takes us to section 96. That section applies to the issue of a search-warrant by the Court. Here the defendant was not acting as a 'Court,' and, all that section 105 enacts is, that instead of the Court issuing a search-warrant, the Magistrate may direct a search to be made in his presence. It is reasonably obvious why this power is given to a Magistrate: but the section does not assist the present defendant.

Then, reliance is placed upon section 165 of the same Code, and the argument is that, inasmuch as Mr. Luffman might have made a search under that section, the search must be

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Counsel for the appellant has pointed out that the learned Judge has found that the circumstances were such as to justify the defendant as District Magistrate in making the search for arms, and that he acted throughout with perfect *bonâ fides* and the learned Counsel contends that the mere omission on the part of the defendant to record his reasons for directing the search, though the reasons in fact existed and were good and sufficient, cannot be held in accordance with the principles of law, justice, equity and the rule of good conscience as governing the district Courts in India, to be in law sufficient to convert what was a right and justifiable act into an actionable wrong.

In this case, however, before attempting to apply the principles, on which the learned Counsel relies, it would be convenient first to see whether in the circumstances of the case the defendant has been able to justify his act on his pleas.

The facts leading up to the search have been already set out in detail.

The learned Judge in the Court below has stated in his judgment that he was satisfied on the evidence that the search was made for arms generally under the provisions of the Arms Act and not under any sections of the Code of Criminal Procedure, and the first question, which arises, is—Does the evidence support that finding ?

On this point we have the evidence of the defendant alone and we have his defence as set out in the written statement. The method adopted in cross-examination of the defendant is, to say the least of it, unusual. By means of a long series of questions many of which on the spur of the moment and without reference to authorities, it was manifestly most difficult for him to answer and in reply to which it is admitted that it would be unfair to bind him by his answers, the learned Counsel appears to have attempted to argue out with the defendant points of law, which it was certainly the duty of the Judge trying the case to decide. What, however, does the defendant say ? In his written statement he first claims protection on the ground that he was acting as a Magis-

recorded the grounds of his belief," are merely directory and not imperative or mandatory. It is difficult to accept this view. A special and drastic power is by this section granted to the Magistrate. Without it, he could not have made the search, unless, as it is suggested, certain provisions of the Criminal Procedure Code apply to a case such as the present. These words must have been inserted in the section with an object and the object probably was to protect the public against searches being inconsiderately directed and to insure the exercise of deliberation by the Magistrate before he ordered the search. A fine distinction is often drawn between what is *mandatory* and what is merely *directory* in the language of any particular Statute. The present case appears to fall within that class of cases in which, when a Statute creates a special right, but certain formalities have to be complied with antecedent to the exercise of that right, a strict observance of the formalities is essential to the acquisition of the right. As the defendant, in the case now before us, did not comply with the required formality by recording the grounds of his belief before he proceeded to search, this section does not appear to protect him from the consequences of his action.

Then it is said that the search was warranted by section 105 of the Criminal Procedure Code. That section runs as follows: "Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant." The Magistrate can only act under this section where he is competent to issue a search-warrant. That takes us to section 96. That section applies to the issue of a search-warrant by the Court. Here the defendant was not acting as a 'Court,' and, all that section 105 enacts is, that instead of the Court issuing a search-warrant, the Magistrate may direct a search to be made in his presence. It is reasonably obvious why this power is given to a Magistrate: but the section does not assist the present defendant.

Then, reliance is placed upon section 165 of the same Code, and the argument is that, inasmuch as Mr. Luffman might have made a search under that section, the search must be

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thought I could act under section 165. The Sub-Inspector of Police was empowered to make a search and I thought I could be present and direct the proceedings. Then I would be acting as an Executive Officer of the Police." When questioned as to his power to direct the search under section 94 and section 96 of the Criminal Procedure Code, he says that he thought, he could issue a search-warrant under section 96 of the Criminal Procedure Code though afterwards he says "There was nothing formal in my inquiry." "No, I was not holding any inquiry as a Magistrate." Afterwards in reply to the question "you wanted to search in order to preserve the peace of the district," he says "That was one of the reasons: one of the reasons was to seize arms to prevent their being used. My search for the arms in connection with that case was equally in my mind. The actual investigation of that case was in the hands of the District Superintendent of Police." At page 115, he further says in answer to a question from the Court "I made up my mind to make the search after hearing the police officers' and the other persons' reports."

The fact that the defendant before directing the search referred to the Code of Criminal Procedure and not to the Arms Act, seems to be consistent rather with the conclusion at least that in his own mind at the time the defendant thought he was acting under the Code of Criminal Procedure and not under the Arms Act, and to support a conclusion contrary to that, at which the learned Judge has arrived, that the search was only for arms generally. They seem fully to support the conclusion that the search was at the same time for arms used in the commission of the two offences, which were alleged to have been committed on the 27th April, when fire-arms were certainly used.

The learned Judge has not referred to the evidence, on which he relied and, after a careful perusal of the defendant's evidence and of his written statement, filed on the 9th November, immediately after the institution of the suit, I regret, that I am unable to agree that the conclusion of the learned Judge is in fact supported by the evidence.

of the Peace, Collector or other person acting *judicially* shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : provided that he, at the time in good faith, believed himself to have jurisdiction to do or order the act complained of and no officer of any Court, or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for the execution of any warrant or order, which he would be bound, to execute, if within the jurisdiction of *the person issuing the same.*" *Can it be said that in conducting* this search, the Magistrate was acting *judically?* Was this act done in the discharge of his *judicial* duty? The Act itself draws a distinction between an executive as opposed to a judicial act : for it protects not only the person who acts judicially, but also the person who executes the order of the person so acting judicially. The duties of a Magistrate in this country are at once *judicial* and *executive.* But here the search must be taken to have been conducted by the Magistrate in his *executive,* and not in his *judicial,* capacity There is, therefore, no Statute which protects the Magistrate in his *primâ facie* wrongful act in trespassing upon the plaintiff's cutchery.

I should have been glad if I could have seen my way to have protected the Magistrate, for he was placed in a difficult position and in one of emergency. That he acted with the utmost *bonâ fides* throughout, I entertain no doubt whatever, and the charge of malice against him is as unfounded as it is improper. The only mistake he made was in not complying with the provisions of the Arms Act before he made the search. We are told that if the decision of the first Court be upheld, it will paralyze the action of Magistrates, in moments of emergency, in this country, and that they will be timid about acting under their statutory powers. I am afraid we cannot go into the consequences of our decision, our only duty is to decide, as best we may, according to what we believe to be the Law. At the same time it may be pointed out that it is of the highest

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the word "proceeding" as used in sub-section 7 of section 145 of the Criminal Procedure Code. Powers to act under section 94 and section 96 of the Code are given to all Magistrates (see section 94 itself and schedule 3 of the Code) and the question is whether a Magistrate can exercise those powers on verbal information only or whether it is necessary for him to wait till something has been written or he is sitting in Court before he can do so. The learned Judge seems to be of opinion that this preliminary is essential. But is it so? Offences are divided into two broad classes (1) Cognizable, *i.e.*, those for which a police officer may arrest without a warrant from a Magistrate and (2) Non-cognizable, *i.e.*, those in which a police officer may not arrest without a warrant. The former seems to mean cases of which a police officer, as such, can take cognizance and the latter, those of which as such he cannot take cognizance. Section 190 of the Criminal Procedure Code lays down the conditions under which a District Magistrate or other Magistrate referred to in that section may take cognizance of an offence. It must be remembered that the defendant in this case was at the time of the search the District Magistrate of Mymensingh. He had therefore power under the law throughout the whole District to take cognizance of the offences with fire-arms, which are alleged to have been committed on the 27th April. And he would be empowered to take cognizance under that section on (*a*) complaint, (*b*) police report of such facts and (*c*) on information received by any person other than a police officer or upon his own knowledge or suspicion that such an offence has been committed. There is nothing in the section to lay down strictly that either (*a*), (*b*) or (*c*) must be written, and in fact the latter portion of clause (*c*) would favour the contrary view. Nor is there anything in the law which strictly lays down that the police officer must have something written before he can take action in respect of an offence, of which he can take cognizance without the order of the Magistrate. Clearly in India as well as in England a police officer must often take cognizance of an offence and arrest the offender on verbal

of the Peace, Collector or other person acting *judicially* shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : provided that he, at the time in good faith, believed himself to have jurisdiction to do or order the act complained of and no officer of any Court, or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for the execution of any warrant or order, which he would be bound, to execute, if within the jurisdiction of the person issuing the same." Can it be said that in conducting this search, the Magistrate was acting *judically?* Was this act done in the discharge of his *judicial* duty ? The Act itself draws a distinction between an executive as opposed to a judicial act : for it protects not only the person who acts judicially, but also the person who executes the order of the person so acting judicially. The duties of a Magistrate in this country are at once *judicial* and *executive.* But here the search must be taken to have been conducted by the Magistrate in his *executive,* and not in his *judicial,* capacity. There is, therefore, no Statute which protects the Magistrate in his *primâ facie* wrongful act in trespassing upon the plaintiff's cutchery.

I should have been glad if I could have seen my way to have protected the Magistrate, for he was placed in a difficult position and in one of emergency. That he acted with the utmost *bonâ fides* throughout, I entertain no doubt whatever, and the charge of malice against him is as unfounded as it is improper. The only mistake he made was in not complying with the provisions of the Arms Act before he made the search. We are told that if the decision of the first Court be upheld, it will paralyze the action of Magistrates, in moments of emergency, in this country, and that they will be timid about acting under their statutory powers. I am afraid we cannot go into the consequences of our decision, our only duty is to decide, as best we may, according to what we believe to be the Law. At the same time it may be pointed out that it is of the highest

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Procedure as showing that Mr. Luffman as District Superintendent of Police had full power to hold an investigation into the two offences committed on the 27th April and power under section 165 of the Code to search the premises of the defendant for the arms with which the offences were committed and which he had reason to believe were in the cutchery, because such a proceeding was necessary for the conduct of the investigation. And all the provisions of the Code as to search-warrants, so far as may be applied, apply to searches under this section, (see sub-section 4 of section 165). If Mr. Luffman as a police officer was acting within the law in conducting such a search it is contended that the defendant, who directed the search, and accompanied the police officer, when he went to make it, would be equally protected by the law. It is to be observed that under the provisions of section 4 of Act V of 1861 powers of general control and direction over the police are given to the Magistrate of a District throughout the limits of his local jurisdiction, and whether the defendant in this instance acted under the powers given by that section or under his powers as a Magistrate under the Code of Criminal Procedure, it is urged that he was equally protected.

This argument seems to be unanswerable, if we take it that the defendant was acting under the powers with which he is vested by section 4 of Act V of 1861, if the search was being made by the District Superintendent of Police.

The learned Counsel for the respondent has, however, argued that in an investigation made under Chapter XIV of the Code of Criminal Procedure, the police officer must proceed strictly in accordance with the provisions of the sections in that Chapter. He must under section 157 send a report to the Magistrate empowered to take cognizance of the offence on the police report, and that report must be submitted through his superior officer (section 158), and on completion of the investigation he must submit a report in the form prescribed by section 173, and if in the course of such an investigation he makes a search, he must note that he has done so in red ink on the report under a departmental order of the police department.

Hindus in the temple of one Doya Moyee. He was told that the person, who had shot the Mahomedan, had fled towards the plaintiff's cutcheries and he was told that the zemindars were storing arms in their cutcheries.

Under these circumstances, on the 28th the defendant went to the plaintiff's cutchery accompanied by the District Superintendent of Police and other persons, who conducted a search under the authority of the defendant.

In respect of this search the plaintiff claimed damages to the extent of Rs. 10,500.

There was some evidence of actual damage done by the persons, who carried out the search apart from the mere trespass. This evidence the persons who made the search were not called to contradict. The Judge, therefore, after acquitting the defendant of any want of *bonâ fides* in the matter awarded the plaintiff Rs. 500 to cover the trespass and the actual damage done.

The learned Counsel for the appellant does not concern himself with the amount of damages, but argues that the defendant is justified under the statutory enactments on which he relies.

The Acts which the defendant considered himself entitled to rely on were the Arms Act and the Criminal Procedure Code. In the course of the argument there was some discussion as to which of these Acts the defendant purported to act under.

That to my mind is of very little importance. The defendant is entitled to call in aid any Statute which justifies his action quite irrespective of whether it was present or not to his mind, when he made the search.

Under section 25 of the Arms Act a Magistrate is authorized, if he thinks a person has arms for an unlawful purpose, to make a search, *having first recorded the grounds of his belief.*

It is admitted that the defendant did not record the grounds of his belief in this case, but it is argued that the [illegible]sion that he should do so is merely directory, and that [illegible]n the premises is justified as he had good grounds fo[illegible] at arms were stored in th[illegible]chery notwithstandi[illegible] to record these groun[illegible]

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on the record to indicate that he went in order to make a general search for arms. It is clear that the Mahomedans generally were at the time in a very excited and infuriated state and it was urgently necessary to keep them under control. A search made to ascertain who were the persons guilty of the offences committed on the 27th April would certainly be a movement in that direction.

To support the contrary conclusion the learned Counsel for the plaintiff relies on paras. 6, 8 and 9 of the defendant's written statement and on the absence of any entry relating to any search in the police report of the case instituted by Genda. Paragraph 13 of the same written statement, however, indicates clearly enough that the defendant pleaded from the first that he was acting under the Code of Criminal Procedure and that he relied on section 165 of the Criminal Procedure Code against others to support his plea. If in the press of work and under the stress of circumstances resulting at the time from the disturbed state of the district and the special steps necessary to keep the peace at Jamalpur, the police officer failed by inadvertence to make the entry as to the search required by the rules in the report, the omission can hardly be regarded as of serious importance.

There seems to be no sufficient grounds for disbelieving the truth of the story as told by the defendant in his evidence, and the balance of probability both from the defendant's conduct at the time and from his defence seems to be in favour of the view that he all along thought he was acting under the Code of Criminal Procedure and not under the Arms Act. In fact it would rather appear that he relied on the provisions of the Arms Act as an after-thought.

In these circumstances his act in directing the search does not appear to amount to a trespass in Civil Law, whether it was done under his orders as a Magistrate, or under his directions by the police in the course of the investigation into the offence committed against Genda.

We have next to consider whether the search, if it was made under the provisions of the Arms Act, amounted to a civil

he was authorized to investigate, and this could not be proved without calling the police officer.

Now the police officer was not called, the facts entitling the police officer to enter and search were not proved. As the case stands there is nothing to show that the police officer considered that it was necessary to any investigation to produce anything. For all that appears he may have searched, just because the defendant told him to

The next section relied on is section 105 read with the other section dealing with the issue of a search-warrant

The defendant considered he was able to issue a search-warrant and therefore under section 105 competent to conduct a search in person

Now the law relating to the issue of search-warrants is to be found in section 96 and the following sections of the Criminal Procedure Code.

By section 96, when the Court considers that the purposes of any enquiry, trial or other proceeding under this Code will be served by a general search, it may issue a search-warrant and by section 105 a Magistrate can direct a search to be made in his presence of any place, for which he is competent to issue a search-warrant.

Could he in the present case issue a search-warrant ?

In my opinion section 96 only authorizes the Magistrate to issue a search-warrant when sitting as a "Court," *i e*, when some proceeding under the Code has been initiated before him and this view is strengthened by the form of the search-warrant given in schedule V, Form 8, which recites that information has been laid or complaint has been made In this case there is no evidence of the initiation of any proceeding before the Magistrate under the Criminal Procedure Code nor of any "information" or a "complaint" being laid before the Magistrate under the Code Moreover the Magistrate appears to have been searching for arms generally, not for some particular weapon

As I read the provisions of the Code it appears to provide for search by a police officer, which may be made under section 165 before any proceeding has been initiated before any Court

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the information given to him by the police was correct. But must not the searches made of the temple and the cutcheries be rather regarded as acts forming part of one transaction? It is not as though the cutcheries and the temple were in different places at some distance from one another. The map filed in the record shews that they are all close together and the information appears to have been to the effect that there was a combination amongst the servants of the different landlords to collect the arms for unlawful purposes and that the arms could not be left in their possession without danger to the public peace. In such circumstances it seems hardly reasonable to expect that the defendant should have proceeded with greater circumspection in searching one cutchery than in searching the other buildings.

The real question, however, appears to be, whether the directions in section 25 of the Arms Act that a Magistrate, before making a search, should record his reasons, are mandatory or directory, and in determining this question we may well be guided by the following remarks of Lord Campbell in *The Liverpool Borough Bank* v. *Turner* (1). "No universal rule can be laid down for the construction of Statutes as to whether mandatory enactments shall be considered as directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be considered." Now the object of the provisions of the Arms Act, and especially of section 25 of that Act, is clearly to preserve the public peace. Can it be held that the directions in section 25 were in their nature so mandatory that the failure to comply with them would have the effect of nullifying the proceedings? Maxwell in his work on the Interpretation of Statutes, page 556, says—"When a public duty is imposed and the Statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such condition may well be

(1) (1861) 30 L. J. Ch. 379.

the Court of the Subordinate Judge to that of the District Judge After receipt of notice of the application the plaintiff, on the 3rd January 1908, applied to the High Court in its extraordinary civil jurisdiction to transfer the suit from the Court of the Subordinate Judge of Mymensingh to the High Court for trial and on the same day a rule *nisi* was issued by the High Court on the defendant to show cause why the suit should not be transferred to the High Court for trial. On the 29th January 1908, an order was passed by Mr. Justice Fletcher transferring the suit to the High Court to be tried by it in the exercise of its extraordinary original jurisdiction. The suit afterwards came on for hearing before Mr. Justice Fletcher on the 25th May 1908.

The following sequence of events is important —

On the 21st April 1907, there was a large fair or *mela* held at Jamalpur. Certain Hindus at the instigation, it is stated, of the Hindu servants of the plaintiff and other zemindars, his co-sharers in the village, tried to prevent the sale of *bideshi* or foreign goods at this fair. The Mahomedans resented this and there was a serious disturbance and the feelings of the Mahomedans towards the Hindus were considerably embittered. In the evening of the 27th April some Hindus dressed, it is stated, in Mahomedan clothes, were seen wandering about and were followed by some Mahomedans. The Hindus turned on the men following them and fired 3 or 4 revolver shots at them, one of which wounded Genda, a Mahomedan. An uproar followed, Mr. Barniville, Sub-divisional Magistrate of Jamalpur, and Mr. Luffman, District Superintendent of Police, who were then in the D k Bungalow at Jamalpur, went to the scene of disturbance and met some Mahomedans carrying away the Mahomedan Genda, who had a wound from a revolver bullet in his leg. Information was given to them that Genda had been wounded by one Prakash Chander Dutta, a leader of a body of Hindus called Volunteers and that Prakash Chander Dutta and those with him had fled in the direction of the cutcheries. The cutcheries of the plaintiff and his co-sharer landlords appear

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purely an executive act. The learned Judge has held that the act was an executive act. The distinction between a judicial and an executive act in India is not very clearly drawn as many acts, which are purely administrative, are generally described as executive. The main distinction between the two appears to be that judicial acts are those acts done or orders passed in the exercise of the judicial discretion or power with which an officer is vested under the law, while executive acts are of a ministerial character either carrying judicial orders into effect or discharging duties not of a judicial nature. In the case of *Hope* v. *Evered* (1) to which we have been referred, it has been clearly laid down that the issue of a search-warrant is a judicial act and in the case of *Mahomed Jackariah & Co.* v. *Ahmed Mahomed* (2) and in the case of *In re Lakhmidas Naranji* (3) a similar view has been taken by the High Courts in India.

The question is whether the order directing a search under the Arms Act or the proceedings in execution of that order differ in essence so materially from searches made otherwise under the law as to constitute the order passed under the Arms Act an executive rather than a judicial act. The whole scope and object of the Arms Act appears to be to impose restriction on the manufacture, sale, import, export and transport and the possession of arms and ammunition, with a view to preserve the public peace and in directing a search under section 25 of the Act the Magistrate has to proceed on information laid to him disclosing that the person is in possession of arms, etc., for any unlawful purpose or that he cannot be left in possession of such arms without danger to the public peace. If he considers that such information is such as to afford sufficient reasons for a search, he is empowered to order one to be made. It can hardly be said that in arriving at the conclusion that the possession was for any unlawful purpose, or that possession of the arms could not be retained without danger to the public peace, the Magistrate is not exercising a judicial discretion, that is to

(1) (1890) L. R. 17 Q. B. D. 338. (2) (1887) I. L. R. 15 Calc. 109, 141.
(3) (1903) 5 Bom. L. R. 980, 982.

At 1-30 P.M. the defendant with Mr. Luffman, the District Superintendent of Police, proceeded to search the cutcheries of the plaintiff and of the other zemindars. The temple of Doya Moyee and the cutchery and Naib's house of the Ram Gopalpur zemindar were first searched. Afterwards the cutchery of the plaintiff was searched. The case for the defendant was that he searched the plaintiff's cutchery in consequence (1) of the reports received by him from Mr. Barniville, and Mr. Luffman of what had occurred on the 27th April, and (2) of the reports previously received that the Gouripore zemindars (*i.e.*, the plaintiff and his co-sharers) had been collecting arms and men in their cutcheries.

At that time none of the *amlahs* or *peadahs* of the plaintiff were to be found and it seems that the Jemadar in charge of the plaintiff's cutchery building had locked it up and left at 1 P.M. The padlocks closing the doors of the building were forced open and the boxes in the cutchery were also forced open and their contents—zemindari papers—taken out in pursuit of the search for arms. The search of all the buildings occupied from 1-30 P.M. to 3-30 P.M.

The main points raised for determination in the suit were (1) was the search made under the provisions of the Code of Criminal Procedure and was the defendant protected from the suit on that account, (2) was the search made under the provisions of the Arms Act and was the defendant protected from suit by that Act, or (3) was the defendant in directing the search acting judicially and were he and those acting under his orders in consequence protected by the provisions of Act XVIII of 1850 ?

In his defence the defendant pleaded (see his written statement, paragraphs 13, 14 and 15 and the preceding explanatory paragraphs 6 to 12) (1) that at the time of the alleged trespass he was District Magistrate of Mymensingh, and as such Magistrate he was acting and did act under and by virtue and in pursuance of the powers conferred on him by law and particularly by all or some one or more of sections 94, 96, 105 and

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The learned Judge in dealing with the question of damages says that the law casts on the defendant as being in supreme control of the search party the obligation of seeing that the search was conducted in a proper and reasonable manner and the learned Judge goes on to say that he entertained no doubt that the search was conducted with unnecessary damage to the property of the plaintiff, and that the defendant failed to exercise proper supervision and control over the people under him conducting the search.

On this point the defendant in his evidence says that he did not see or sanction the destruction of any property more than was reasonably necessary for the purpose of opening the boxes. He says that only one complaint was made to him that the police were doing unnecessary damage and that was when the cutchery and house of the Naib of the Ram Gopalpur cutchery was being searched and that "he took steps to see to it." He adds "I told Mr. Luffman to tell the police to put back the things left lying about, and it is not a fact that the complaint was repeated to me, while I was searching at the plaintiff's premises." He denied that armed Mahomedans accompanied him during the search or took part in breaking open the boxes. It is true that in a latter portion of his evidence the passage occurs "I think daos were used by the Mahomedans, but I am not absolutely certain," but as just before that he had said that the Mahomedans took no part in the search, it seems not impossible that there may have been some confusion on this point in the record of his statement. The context seems to support that conclusion. He says that before breaking open the door of the cutchery and the boxes, he tried to obtain the keys, but none were produced.

In support of his conclusion on this point the learned Judge relies mainly on the evidence of Mr. Horniman. Now, without in any way wishing to question the veracity of that witness, what in fact does his evidence prove? Mr. Horniman did not arrive at the cutchery till the morning of the 1st May, the search having taken place on the afternoon of the 28th

ammunition or military stores without danger to the public peace and the defendant had failed to record the grounds for his belief to that effect before he directed the search.

Dealing next with the plea based on the provisions of sections 105 and 106, Criminal Procedure Code, the learned Judge dismisses it very summarily with the observation that it is obvious that the defendant was not competent to issue a search warrant under the provisions of the Code of Criminal Procedure, as he was not acting as a Court within the meaning of section 94 of the Criminal Procedure Code, as there was no proceeding pending before him.

He then takes the plea based on the provisions of section 165 of the Code of Criminal Procedure that the search was in fact one made by Mr. Luffman, the District Superintendent of Police, who at the time was making an investigation into the offence committed by the person, who shot at and wounded Genda on the 27th April 1907 and that as Mr. Luffman as a police officer had authority under section 165 of the Code of Criminal Procedure to make the search in the course of that investigation, the defendant, having taken Mr. Luffman to make the search, was protected by the law in the same way as Mr. Luffman. As to this the learned Judge says that he was satisfied on the evidence that the search was not intended to be made under the provisions of that section, but was a search for arms generally, which section 165 does not authorise and therefore he held that section 165 of the Criminal Procedure Code did not justify the action of the defendant. It is unfortunate that the learned Judge does not specify the evidence, on which he relied in support of this conclusion.

Further, he held that the provisions of Act XVIII of 1850 could not be invoked to protect the defendant, because he was of opinion that in directing and conducting the search the defendant was performing no judicial duties at all. It is to be noticed that the judgment gives no distinct reasons for the opinion that the act was not a judicial act, but that it was "one of the important executive acts, which as District Magistrate the defendant had to perform."

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by other authorities under similar circumstances, such consideration is shewn however desirable it may be. No attempt was made to support the case for the plaintiff as set out in the plaint that papers of value were lost and destroyed. The search does not appear to have been conducted in an unusual manner and I am unable to agree with the learned Judge that it was conducted with unnecessary damage to the property of the plaintiff.

For the above reasons, I am unable to agree with the learned Judge in holding that the defendant was liable to pay the damages, which has been awarded against him, and I would decree the appeal and dismiss the suit with costs

Appeal dismissed.

Attorney for the appellant: *F. H. Eggar.*

Attorney for the respondent: *H. N. Datta.*

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malicious and outrageous abuse of his authority. The learned Judge has found that the defendant acted *bonâ fide* and without malice, but that as he had failed to comply strictly with the provisions of section 25 of the Arms Act he committed a trespass.

The first point taken in support of the appeal is that the learned Judge erred in regarding the principles of the Common Law of England as applicable to the present case. The learned Counsel has pointed out that the alleged trespass having been committed in the District of Mymensingh, which is outside the limits of the ordinary civil jurisdiction of the High Court and the suit having been transferred to the High Court for trial in the exercise of its extraordinary civil jurisdiction, the learned Judge was bound under the provisions of section 20 of the Letters Patent of 1865, with respect to "the law or equity and the rule of good conscience" to be applied to the case, to apply "the law of equity and rule of good conscience," which would have applied to the case in the local Court of 3rd Sub-Judge of Mymensingh. This contention cannot be denied and clearly the principles of English Common Law could not be taken to apply as such. The learned Counsel for the respondent in reply has, however, invited attention to the decision in the case of *Waghela Rajsanji* v. *Sheikh Masludin* (1) as practically laying down that the same principles would apply. But the learned Judge in dealing with the point which arose in that case and which was whether a guardian could execute a contract in the name of his ward, so as to impose on the ward a personal liability, remarks that a guardian in India could not have greater powers over a ward than a guardian in England, and adds that the matter must be decided by equity and good conscience which is generally interpreted to mean the rules of English Law, *if found applicable to Indian society and circumstances*. This clearly lays down that the principles would only apply, if found applicable to the circumstances of the case under consideration. In the present case the learned

(1) (1887) I. L. R. 11 Bom 551, 561.

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Laliteshwar Singh, his third son, and a fourth son. Lakshmishwar Singh died on the 17th December 1898 without leaving issue, and on his death his brother Rameshwar Singh entered upon and took possession of the Raj. On the 27th March 1907 this suit was filed.

It was alleged by the plaintiff that on the 28th August 1880 the defendant Rameshwar Singh had renounced and relinquished all his claims to the properties of the Raj, at the time held by his father Moheshwar Singh, that the defendant had long been separate in food and worship from his brother Lakshmishwar Singh, and that on the 28th August 1880 owing to disputes and differences between them they became separate in estate and were never thereafter re-united in food, worship or estate, whereas, he, the plaintiff, continued to be joint in estate with Lakshmishwar Singh until his death. The plaintiff further alleged that the succession to the Durbhanga Raj was governed by the *ordinary* rule of primogeniture subject to the *kulachar* or family custom whereby the reigning Raja had the power of abdicating and assigning the Raj in favour of his nearest immediate male heir, and that no such abdication or assignment had been made by the late Maharajah Lakshmishwar Singh. The plaintiff accordingly claimed, that on the death of the late Maharajah, he became entitled to succeed to the Raj and its property by survivorship. He added that he was ignorant of his rights until the recent claim by the defendant Maharanis to the property of the Raj.

The defendant Rameshwar Singh denied that he had in any way renounced or relinquished his right of succession to the properties of the Raj, or that he had at any time become separate with the late Maharajah in estate and stated that a certain deed of the 20th August 1880 only purported to give him certain properties as a maintenance or *babuana* grant. He alleged that the succession to the Durbhanga Raj and its properties was regulated by the *kulachar* or family custom according to which the succession devolved upon the next immediate male heir of the last holder, to the exclusion of females according to the rule of *lineal* and not *ordinary* primogeniture. The

trate under the provisions of sections 94, 96, 105 and 165 of the Code of Criminal Procedure. None of these could possibly apply to a search under the provisions of the Arms Act. It is equally a matter, which admits of no doubt, that if the search was made for arms used in the commission of an offence, and for the purpose of an enquiry or an investigation into that offence, the provisions of the Arms Act could have no possible application. That Act in section 25 provides for a search for arms and ammunition generally for the preservation of the public peace and not for weapons used in the commission of a definite offence

To support the defendant's assertion that he acted under the provisions of the Code of Criminal Procedure, we have the following statements. In examination-in-chief he was asked "why did you make the search," and he gave the following reply .—

"I had received reports for some time that certain zemindars, in special the Gouripore zemindars, had been collecting arms and men in their cutcheries. The Mahomedans of Jamalpore stated that they feared the Hindus would sally out from their cutcheries and do them injury again as soon as the officials had left. A case had been instituted with regard to the shooting of a Genda Sheikh and it was proposed to institute cases for the shooting on the Sub-divisional Officer and Superintendent of Police. For the purpose of these cases it was all important that the weapons, with which the shooting was done, should be found. It was also very dangerous to leave it unascertained whether there was not a considerable store of arms in those cutcheries" The following answers were elicited from him in his cross-examination (at pages 108 to 114 of the paper-book). "Before this search I did refer to the Criminal Procedure Code: I did not refer to the Arms Act." Further on he says, "I thought I could act under section 105" and then he was stopped; and later on, in answer to a question relating to his power to act under section 165 of the same Code, he says "in this way I

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who is to be the successor to the Raj and being an impartible estate the defendant could not have separated *quoad* the Raj from the late Maharaja.

The plaintiff also alleges that by the *kulachar* or family custom the succession to the Raj is governed by the rules of lineal primogeniture and not of ordinary primogeniture. It is however admitted that whether the succession to the Raj is according to ordinary or lineal primogeniture, the right of the defendant is prior to that of the plaintiff unless it can be shown that the defendant separated in estate from the late Maharaja.

As I have already said, it is the plaintiff's own case that the Raj is an impartible estate and so incapable of partition, it follows, in my opinion, that there could be no separation in estate between the late Maharaja and the defendant *quoad* the Raj.

In my opinion, the plaint in this case cannot be amended so as to disclose a valid cause of action. The whole basis of the suit rests upon a separation in estate between the late Maharaja and the defendant with respect to this impartible estate. The suit is therefore, in my opinion, frivolous and vexatious and I order that the same be dismissed with costs including all costs reserved.

From this judgment, the plaintiff appealed.

Mr. Pugh, for the appellant. This suit should not have been dismissed on the pleadings. The proposition, that in the case of an impartible Raj, the question of the alleged separation was immaterial, is, it is submitted, erroneous. The question of separation from the joint family is a material question of fact which must be decided on the evidence. The test of the right to succeed to an impartible Raj, is whether the claimant was joint with the late holder, or separate from him. The Privy Council has in numerous cases laid down this test as deciding the right to succeed: see *Katama Natchiar* v. *The Rajah of Shivagunga* (1), *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (2), *Chowdhry Chintamun Singh* v. *Mussamut Nowlukho Konwari* (3), *Periasmi* v. *Periasmi* (4), and *Doorga Persad Singh* v. *Doorga Konwari* (5). *Ram Nundon Singh* v. *Janki Koer* (6) was tried on the question of fact, whether there had been separation or not. In the present case, the appellant's claim as a joint cousin is prior to that of the respondent, a separated brother. It was

(1) (1863) 9 Moo. I. A. 539.
(2) (1870) 13 Moo. I. A. 333.
(3) (1875) L. R. 2 I. A. 263.
(4) (1878) L. R. 5 I. A. 61.
(5) (1878) I. L. R. 4 Calc. 190.
(6) (1902) L. R. 29 I. A. 178; I. L. R. 29 Calc. 828.

The question then arises for determination, whether the defendant was justified in directing the search by the provisions of the Code of Criminal Procedure.

First it is to be considered whether the defendant had power to act under the provisions of section 105 read with the provision of sections 94 and 96 of the Code. These sections occur in Chapter VII which falls within Part III of the Act, which is headed "General Provisions." That these provisions apply to proceedings before and after the proceedings in prosecution of an accused is clear from the sections themselves. They do not necessarily apply to proceedings after a case has been instituted against any definite accused person. Section 94 runs: "Whenever any Court or in any place beyond the limits of the towns of Calcutta and Bombay any officer in charge of a Police station considers that the production of any document or other thing is necessary or desirable for the purpose of any investigation, enquiry, trial or other proceeding under this Code by or before such Court or officer, etc." An investigation by a police officer or any inquiry by a Magistrate may be made before any accused person has in fact been named.

The learned Judge has held that the defendant was not acting as a "Court" within the meaning of section 94 of the Criminal Procedure Code, as there was no proceeding pending before him. "Court" is nowhere defined in the Code nor is "a proceeding." From Chapter III of the Code it would, however, appear that the term "Court" and "Magistrate" are in fact synonymous and it should be remembered that under the special conditions prevailing in India a Magistrate is frequently called upon to act as a Court, even though he may not at the time be sitting within the four walls of his ordinary Court building or in fact any building. The powers of the Court depend on the power with which the Magistrate presiding in it is vested. "Proceeding" appears to mean anything done or order passed by the Magistrate or Court in the exercise of his powers. This indeed seems clear, for instance from

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MACLEAN C.J. This is a suit to recover possession of the Durbhanga Raj estate, one of great value. The present Maharajah is a brother of the late Maharajah; and the plaintiff's case is that the present Maharajah and the late Maharajah had long been separate in food and worship, and owing to disputes and differences between them, they on or about the 28th of August 1880 became separate in estate and were never thereafter re-united in food, worship or estate. He further alleges that on or about the last-mentioned date the defendant Maharajah for valuable consideration moving from the late Maharajah renounced and relinquished by deed all his claims to any of the properties moveable and immoveable held by Maharajah Moheshwar Singh or which might have been subsequently acquired and added thereto: that the late Maharajah died suddenly on the 17th December 1898 intestate and without having abdicated or assigned the Raj, leaving no issue, natural or adopted, but leaving the plaintiff and the Maharajah defendant his brother, from whom he had been separated as aforesaid, and leaving behind him amongst other things, the property described in the schedule to the plaint, whereof he was the owner, being entitled thereto as an impartible Raj, subject to the *kulachar* custom or usage mentioned in the 10th paragraph of the plaint. The case of the defendant put shortly is that the Durbhanga Raj is an ancient impartible estate held and enjoyed by the defendant's family for several centuries, and the devolution thereof, and the succession to the said Raj are regulated by the *kulachar* or family custom attaching to the said Raj, according to which the succession devolves upon, and passes, to the next immediate male heir of the last holder, to the exclusion of females, according to the rule of lineal primogeniture: and the defendant denies that the rule of ordinary primogeniture governs such succession as stated in the 10th paragraph of the plaint. He also says that it is wholly untrue that the defendant and the late Maharajah became, on the 28th day of August 1880, or at any time, separate in estate, the fact being that, on the 20th of August 1880, an arrangement was come to between the late

information alone. There seems to be nothing in the law or in common sense to prevent a Magistrate from acting on verbal information and taking cognizance of an offence and taking the steps necessary to arrest the offender or, as in the present case, to secure the production of the weapon with which an offence has been committed. Manifestly there are cases when the offender would escape or material evidence would disappear, if a written proceeding were in law strictly necessary. In this case the defendant has stated in his evidence that before directing the search he had received the information verbally from Mr. Barnville, the Sub-divisional Magistrate, as well as from Mr. Luffman, the District Superintendent of Police, that the two offences had been committed on the preceding day, and in these circumstances it seems difficult to agree with the learned Judge that the defendant had no power to direct or make the search under the provisions of section 105 read with sections 94 and 96 of the Criminal Procedure Code, because no proceeding was pending before him. The verbal direction to search was in fact in itself a proceeding taken in taking cognizance of the offences I regret, therefore, that I am unable to agree with the learned Judge that for the reasons given by him the defendant was not authorised to make or direct the search in the premises of the plaintiff. Nothing in this case seems to turn on the meaning of the term "competent" in the provisions of section 105. It simply means that the Magistrate has, under the powers with which he is vested by the Local Government, and in the circumstances stated in the preceding sections 94 and 96, power or authority as such Magistrate to issue the search-warrant.

The next question raised is the alternative whether under the provisions of section 165 of the Code the defendant is protected from the present action. This question has not been considered by the learned Judge. He has simply held that it does not arise.

The learned Counsel for the appellant has relied on the provisions of sections 156, 157, and 165 of the Code of Criminal

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preferable to ascertain what the amendment asked for was, and if the Court thought that the amendment was permissible to have dealt with the case on the footing of that amendment. *But apparently nothing was said as to what the proposed* amendment was to be. When the case came before us, Counsel asked for leave to amend, and at the bar the amendment he asked for was of a very formal nature, merely to show how the defendant as a third son of Maharajah Kumar Ganeshwar Singh, who did not die until the year 1903, had become entitled to the Raj, notwithstanding the existence of other members of the family, the grandsons, who survived the Maharajah Kumar Ganeshwar Singh. We asked that these amendments should be reduced into writing; this has been done and they assume a different and wider aspect. But the amendments, even if we allowed them at this late stage of the case, only show that the claim of the plaintiff is dependent upon the so-called separation between the present Maharajah and his brother the late Maharajah, and, as has been shown, this Raj being impartible, there could be no such separation in estate. Apart from this, however, in the exercise of the judicial discretion which is vested in us, we think it is too late, at this stage of the case, to allow the amendment, which was not submitted or asked for to the Court of first instance. The appeal, therefore, must be dismissed. We think the suit is a vexatious one, and we *dismiss the appeal with costs.*

HARINGTON AND BRETT JJ. concurred.

Appeal dismissed.

Attorneys for the appellant: *Pugh & Co.*

Attorneys for the respondent: *B. N. Basu & Co*

J. C.

The learned Counsel relies on the report submitted by Mr. Luffman in respect of the offences under sections 326 and 307 of the Indian Penal Code alleged to have been committed on Genda Shaikh, (which is printed at page 47 of the Paper Book) as proving that in fact the cutchery of the plaintiff was not searched in the course of an investigation made by Mr. Luffman into that offence. The report bears date the 2nd May 1907 and contains no entry of any search having been made.

It is not clear, however, that the report is the final report in the case, but the point is not very material It is to be observed that two dates for the first information are given in it, *viz.*, the 27th April 1907, and the 2nd May 1907, and this seems to support the explanation that the information was given verbally on the 27th April, but not recorded till the 2nd May. The omission to record the entry in red ink to the effect that a search had been made in the course of that investigation, if due to inadvertence, would not itself be sufficient to establish that no search was made, if in fact it was made.

It seems open to considerable doubt whether it would be safe to construe the provisions of the law so strictly in the present case, as the learned Counsel desires, as to deprive the defendant or the police officers acting under his orders of the protection of the law.

If in fact the police officer Mr. Luffman went to the cutchery of the plaintiff under the directions of the defendant to investigate the offence committed against Genda and the search was made in the course of that investigation, it seems only reasonable to hold that they were acting *bonâ fide* under the provisions of the law and therefore the act did not amount to an actionable trespass.

To prove that they did so act there is the evidence of the defendant himself and his written statement. There is the further fact that the defendant went to Jamalpur that day in consequence of the receipt of the telegram from Mr. Luffman with regard to the events of the 27th April. There is nothing

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insolvent may be ordered to show cause why she should not forthwith deliver up possession of the premises No. 77, Dhurrumtollah Street to the Official Assignee or to the petitioner, and in default why she should not be committed for contempt."

The matter came on for hearing before Sharfuddin J. on the 21st September 1908. The insolvent submitted that no order of ejectment could be passed against her on an application in Insolvency; the Court, however, ordered the insolvent to make over possession within a week to the Official Assignee. His Lordship observed as follows :—

SHARFUDDIN J. This is a rule calling upon the insolvent, Maud Anderson, to shew cause why she should not deliver possession of No. 77, Dhurrumtollah Street in Calcutta to the Official Assignee or to the applicant, and in default why she should not be committed for contempt. It appears that the insolvent filed her insolvency petition on the 4th August 1908, and with that also she filed a schedule of property in possession, and in that schedule I find under the heading interest in land, houses, rents and other real estate no mention of any interest in the house in question and it is described in the schedule as *nil* and the only two properties described as in the possession of the insolvent are two dog carts and one office-jaun. The contention on behalf of the proprietor of the house No. 77, Dhurrumtollah Street, is to the effect that the insolvent after being declared insolvent should have delivered possession of the said premises to the Official Assignee or to him. So far as the delivery to himself is concerned, that part of the case has been given up and the applicant confines his case to the first part, namely, that the insolvent make over possession to the Official Assignee which has not yet been done. Under section 7 of the Indian Insolvency Act, it is clear that all the interest of the insolvent on the making of the vesting order vested in the Official Assignee, and under section 21 of the said Act the Official Assignee has to take possession of all such interest of the insolvent and then to exercise his discretion as to whether he would keep the property in his possession or not. Learned Counsel appearing on behalf of the insolvent to shew cause concedes that under section 21 all property should be taken possession of by the Official Assignee who is to elect whether he will keep possession of the property or not. Under these circumstances, I am of opinion that the insolvent should at once deliver possession of the premises to the Official Assignee. As to her being committed for contempt, that I do not think I should do for although the insolvent has not disclosed any interest in the premises No 77, Dhurrumtollah Street, she has described herself as a boarding house-keeper carrying on business at No 77, Dhurrumtollah Street. I do not think she has wilfully concealed her interest in the property in question. In the above circumstances, I make the rule absolute so far as it concerns the delivery of possession of the premises to the

trespass on the part of the defendant, because he failed to comply with the provisions of section 25 of the Act and to record his reasons for making it before he directed it to be made. To prove that the defendant had good reasons for making the search there is his own evidence, which appears to have been accepted as sufficient by the learned Judge, who tried the case. The Judge has found that the defendant acted *bonâ fide* and that he was not actuated by malice or improper motives against any particular individuals or section of the community. He holds, however, that the omission of the defendant to comply with the provisions of the law rendered his act under the Common Law of England a trespass, for which he was liable in damages at Civil Law, though otherwise it might have been right and proper. On behalf of the defendant reliance is placed on the circumstances that the conditions under which he acted were exceptional and that he was obliged under the stress of circumstances and the emergency to take prompt action. On this point the defendant in his evidence says when asked why he omitted to record his reasons for the search under the Arms Act: "There was a great deal to be done, I had not time to look everything up I could not spare the force of men to watch the cutcheries and have the search later on. I thought of the Arms Act, but I had not it with me and it would take sometime to get a copy. At the time I was not aware of the provisions of the Arms Act I thought I had power (to direct a search), if I had reasonable grounds. I did not realise I had to record that" Further on he says that in good faith he believed he had jurisdiction in the matter.

For the plaintiff, it has been urged that as the greater number of the Hindus had fled out of panic and the cutchery was deserted there was no necessity for haste, and the learned Judge has expressed the opinion that in searching the cutcherry of the plaintiff the defendant should have proceeded with great circumspection as the fact that he had previously searched the temple and the cutcheries of three other zemindars and had found no arms, should have led him to doubt whether

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section 22 of the Insolvent Act, I was debarred from distraining. The landlord's only remedy was to ask the Court to order his premises to be made over to the Official Assignee, who would then elect to retain the property and be open to an action brought by the landlord, or make over the property to the landlord. Under section 26 of the Insolvent Act, the Court had power to make a similar order against a stranger: surely, the Court had jurisdiction to make the order against the insolvent himself. To relegate the landlord to a suit for ejectment, would subject him to loss of rent for a considerable interval.

MACLEAN C.J. One Maud Anderson became insolvent on the 4th of August 1908. It appears that she was a monthly tenant of certain premises known as 77, Dhurrumtollah Street, at a rent of Rs. 300. On the 7th of September 1908, an application was made by her landlord the practical object of which was that the insolvent should be ordered to shew cause why she should not forthwith deliver up possession of those premises either to the landlord or to the Official Assignee. That matter came on for hearing, and notwithstanding the objection of Maud Anderson, the insolvent, the Court ordered the insolvent to make over possession within a week to the Official Assignee. She did not do that, and the result was that a contempt order was passed on the 18th of November 1908. She now appeals: and she says that the Court sitting in Insolvency had no jurisdiction to make the first order. I think her contention must prevail. I can see nothing in the Insolvency Act which enables the Court to make at the instance of a landlord, what is virtually an order for ejectment against his tenant. It is said that her interest in this house vested in the Official Assignee. That would be true if she had any interest, but the landlord proceeds on the footing that the lease had determined, that Maud Anderson was a trespasser and that he was entitled to immediate possession. In this view, there was nothing to vest in the Official Assignee. If the Official Assignee thought he was entitled to and wanted possession, it was for him to have applied to the Court. But there are no provisions in the Insolvency

regarded as intended to be directory only when injustice or inconvenience to others who have no control over those exercising the duty would result, if such requirements were essential and imperative." There can be no reasonable doubt that in laying down the conditions in section 25 of the Arms Act the object of the Legislature was to insure that in each instance a Magistrate should not enter on a search without due care and good and sufficient reasons. At the same time, when, as in the present case, it has been found that the Magistrate acted *bonâ fide* and for good and sufficient reasons, can the failure on his part to record his reasons, which was due to exceptional conditions, stress of circumstances and the emergent necessity for prompt action, be held so to nullify his act as to convert what was right and justifiable for the preservation of the public peace into an actionable wrong ? To hold that it would have that effect appears hardly to be consistent with the rules referred to above or with the principles of justice and good conscience. It is no doubt most necessary to prevent public officers from exercising their powers in a harsh, careless or arbitrary manner. At the same time it appears to be hardly just or reasonable to hold that, when an officer has acted *bonâ fide* in what he believed to be the discharge of his duty, and when it has been found that he had good and sufficient reason for his action, he should be liable under the Civil Law for damages for a trespass, because through inadvertence he failed strictly to observe, a formality, which in the circumstances of the case was not of serious importance, and which may be taken to constitute a technical rather than a substantial defect in his proceedings.

This seems to have been the fact in the present case and it seems difficult to say that in consequence the act of the defendant amounted to a trespass.

There remains lastly for determination the question whether the defendant can in this case claim to be protected by the provisions of Act XVIII of 1850, and in dealing with this question it has to be determined whether his act was a judicial act or



say, arriving at a conclusion on the evidence. Indeed, if the act is not a judicial act, it seems difficult to understand what the object of the Legislature was in requiring that the Magistrate should record his reasons. It seems difficult to suppose that the Legislature intended to empower a Magistrate to deprive a person of his property even temporarily by an executive act. It seems to me, therefore, very difficult to hold that the order directing the search was an executive act on the part of the defendant.

If that be the case, then the provisions of Act XVIII of 1850 appear to be sufficiently wide not merely to protect the defendant, but also those acting under him. The section runs: "No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time in good faith believed himself to have jurisdiction to do or to order the act complained of, and no officer of any Court or other person, bound to execute the lawful warrants or order of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Court for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

The learned Judge, who tried the case, has expressed the opinion that the search was "one of the important executive acts, which as District Magistrate the defendant had to perform," but he has not stated his reasons for arriving at that conclusion. I regret to say that I am unable to agree that the order directing the search, based on information received, which was held to afford good reasons for it, and made for the preservation of the public peace, was in fact an executive act. It appears to me, therefore, that the defendant and the police officers acting under him are protected from suit by Act XVIII of 1850.

April. To fill up the interval there is the evidence of Safatulla Jemadar. And to prove the character of the search proceedings themselves there is the evidence of Jogesh Chander Dutt, pleader, Issur Chander Guha, mukhtear, and Kali Kumar Mitter, medical practitioner. The evidence of these three last mentioned gentlemen is certainly not beyond suspicion of bias and Safatulla in a post-card, which is proved to have been sent after the occurrence, gave an obviously exaggerated account of what had happened.

But if the evidence of all these be taken into account, what in fact does it amount to? The door of the cutchery house was fastened by a chain and padlock. The padlock was forcibly broken open. The boxes in the cutchery appear to have been fastened, some with chains and padlocks and others with locks, and to open them the padlocks were forced by bamboos and other boxes forced open with daos, that is to say, hatchets. Mr. Horniman expressed the opinion that lock-smiths might have been called in. The defendant on this point says that he did not think of sending for lock-smiths.

The point has been taken for the plaintiff respondent that defendant ought to have examined Mr. Luffman or the Sub-Registrar to prove what was done at the time of the search To this the learned Counsel for the appellant has replied that those gentlemen and others were cited and were present as witnesses. It was not deemed necessary to examine them as it was thought that if the Court would not believe Mr Clarke it would not be likely to believe officers subordinate to him, who were in fact alleged to have been equally blameworthy for the method of the search and one of whom was a defendant in a similar action on the same facts I must say that I fail to see how the evidence of these witnesses would have materially improved the position of the defendant, as clearly each of them would have been open to the imputation of bias

It has been suggested that the papers contained in the boxes ought to have been replaced, when no arms were discovered. I doubt, however, whether in similar searches, when conducted

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APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Brett

LALITESHWAR SINGH

v.

RAMESHWAR SINGH.*

1909
Feb. 6.

Hindu Law—Impartible Raj—Separation in estate, whether possible—Spes successionis—Cause of action—Leave to amend.

In the case of an impartible Raj, during the life of the holder, the interest of a member of his family is only a *spes successionis*, which is not a subject for partition: also, there can be no separation in estate, as there is nothing upon which such separation can operate.

An application for leave to amend the plaint, so as to disclose a cause of action, refused as being made at too late a stage of the case.

APPEAL by the plaintiff, Laliteshwar Singh, from the judgment of Fletcher J.

This suit was brought by the plaintiff, Laliteshwar Singh for a declaration of his title to the Durbhanga Raj and for the recovery of possession of the property of the Raj from the defendant, who was then in possession. The two widows of the late Maharajah were made party-defendants to the suit.

The Durbhanga Raj is an ancient impartible Raj, and its properties appertain to the Raj and devolve on the successor to the Raj.

In 1850, Maharajah Rudra Singh of Durbhanga died leaving four sons Moheshwar Singh, the eldest, Ganeshwar, the second and two other sons. His successor Moheshwar Singh died in 1860 leaving Lakshmishwar Singh, his eldest son, and the respondent Rameshwar Singh, and was succeeded to the Raj by Lakshmishwar Singh. Ganeshwar Singh died in 1903, leaving two grandsons by his predeceased eldest son, two grandsons by his predeceased second son, the appellant

* Appeal from Original Civil No. 15 of 1908.

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The Bombay Code, A Digest of Indian Law Cases, 1905 and 1906, by C. E. Grey. Barrister-at-Law.

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Act I of 1878 (Opium), as modified up to 1st October, 1907 ...	0	0	0	[1a.]
Act VI of 1882 (Companies), as modified up to 1st August, 1906	1	10	0	[8a.]
Act XV of 1882 (Presidency Small Cause Court), as modified up to 1st June, 1906	0	10	0	[2a.]
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906	2	6	0	[1a.]
Act VIII of 1894 (Tariff), as modified up to 1st February, 1906 ...	0	9	0	[2a.]
Act XII of 1896 (Excise), as modified up to 1st March, 1907 ...	0	8	0	[2a.]
Act II of 1899 (Stamps), as modified up to 1st March, 1907 ...	1	0	0	[2a.]

III.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor-General of India in Council from 1905 up to date.

Regulations made under the Statute 33 Vict., Cap. 3, from 1905 up to date.

[The above may be obtained separately. The price is noted on each.]

defendant submitted that he had rightfully succeeded to the Raj on the death of Lakshmishwar Singh by virtue of the *kulachar* or family custom, by virtue of an adoption alleged to have occurred in November 1896, and lastly as the united brother of the late Maharajah. The defendant further alleged that in 1904, at the instigation of the plaintiff, the widows of Lakshmishwar Singh instituted an action contesting the defendant's title and claiming the Raj, and that on this action being compromised in March 1906 by a consent decree confirming the defendant's title, the present suit was instituted for the purpose of harassment and extortion. A further plea of limitation was raised in defence

The suit was set down for settlement of issues In his opening Counsel for the plaintiff admitted that the plaint required amendment. Fletcher J., however, on the 30th March 1908, dismissed the suit on the ground that the plaint could not be so amended as to disclose a valid cause of action. The judgment of his Lordship was as follows :—

FLETCHER J This suit is set down for settlement of issues.

On Mr Hill opening his case, it was admitted by him that the plaint requires some amendment. The question is whether the plaint can be so amended as to disclose a reasonable cause of action, which ought to be tried by this Court.

The suit is brought to recover possession of the Durbhanga Raj estate. The present Maharaja is the brother of the deceased Maharaja. The plaintiff alleges in his plaint that the present Maharaja ceased to be joint in food, estate and worship with the deceased Maharaja, that the plaintiff's father and the plaintiff remained joint in food, estate and worship with the deceased Maharaja and that upon the death of the deceased Maharaja in 1898 the plaintiff in accordance with the family custom succeeded to the Raj.

That is an obvious error because the plaintiff's father did not die until the year 1903 and if any one succeeded to the Raj, it must be according to the plaintiff's own account his own father. That, as Mr. Hill says, is capable of being amended.

Now, it is admitted by both sides that the Raj is an impartible estate. In fact this is the substance of the plaintiff's claim, *viz.*, that he succeeded to the Raj as an impartible estate. It is well established by authority that an impartible estate is capable of alienation by the holder either *inter vivos* or by will. The only case in which this estate is to be considered joint is for purposes of succession and maintenance of the younger members of the family. The Raj is therefore to be considered joint estate only in the case for determining

admitted in the Court of first instance that some amendment of the plaint was necessary. The amendment is of a formal nature to shew that the plaintiff's cause of action arose in the lifetime of his father, as he must be taken to have abdicated in favour of his son, or at any rate, if not on the 17th December 1898, on the father's death in 1903, and to make it more clear that the plaintiff claimed priority over the sons of his predeceased elder brothers, as the *kulachar* or family custom was of succession by the rule of ordinary and not lineal primogeniture.

Mr. Garth (*Mr. Dunne, Mr Chakravarti* and *Mr B C. Mitter* with him), for the respondent It has been held in the later decisions of the Privy Council that an impartible estate is capable of alienation by the holder either *inter vivos* or by will: *Thakur Shankar Baksh* v. *Dya Shankar* (1), *Sri Rajah Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v *Court of Wards and Venkata Kumari Mahipati Surya Rao* (2) It follows that the owner of an impartible Raj is the absolute owner, and the other members of the joint family during the life of the holder have no present interest in the Raj, and having none, there is nothing to relinquish, and in Law there can be no separation, *quoad* the Raj. A member may cease to be joint in food and worship, but not *quoad* the Raj. All that exists during the life of the holder is a *spes successionis*. And this does not amount even to a reversionary right. *Nund Kishore Lal* v. *Kanee Ram Tewary* (3) was also referred to.

Mr. Pugh, in reply. The decisions in the Privy Council cases cited against me cannot overrule the decisions in the Privy Council cases cited by me. They must stand together and be reconciled. During the life of the holder of an impartible estate, the interest of the other members may be a *spes successionis*, which would be no present interest. But this is not inconsistent with the theory, that the test of the right of succession on the death of the holder is whether the claimant was joint with the holder, or not.

Cur. adv. vult.

(1) (1887) L. R. 15 I. A. 66. (2) (1899) L. R. 26 I. A. 83.
(3) (1902) I. L. R. 29 Calc. 355

	Rs.	A.	P.	
Act XV of 1877 (Limitation), as modified up to 31st December, 1900	0	12	0	[2a.]
Act VI of 1878 (Treasure Trove), as amended by Act XII of 1891	0	2	6	[1a.]
Act VII of 1878 (Forests), as modified up to 1st December, 1903	0	10	0	[2a.]
Act VIII of 1878 (Sea Customs), as modified up to 1st February, 1904	1	5	3	[4a.]
Act XI of 1878 (Arms), as to modified up to 1st May, 1904 ...	0	6	0	[1a. 6p.]
Act XVII of 1878 (Ferries), as modified up to 1st June, 1902 ...	0	6	0	[1a. 6p.]
Act XVII of 1879 (Dekkhan Agriculturists' Relief), as modified up to 1st March, 1895	0	10	0	[2a.]
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896	0	7	6	[1a.]
Act VII of 1880 (Merchant Shipping), as modified up to 15th October, 1891	0	10	0	[1a.]
Act V of 1881 (Probate and Administration), as modified up to 1st July, 1890	0	12	0	[2a.]
Act XV of 1881 (Factories), as modified up to 1st December, 1904	0	5	6	[1a. 6p.]
Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st August, 1897	0	10	0	[1a.]
Act XVIII of 1881 (Central Provinces Land-revenue), as modified up to 1st March, 1905	1	2	0	[2a.]
Act II of 1882 (Trusts), as modified up to 1st June, 1903 ...	0	10	0	[1a.]
Act IV of 1882 (Transfer of Property), as modified up to 1st December, 1905	0	15	0	[2a.]
Act V of 1882 (Indian Easements), as amended by the Repealing and Amending Act, 1891 (XII of 1891)	0	8	0	[1a.]
Act XII of 1882 (Salt), as modified up to 1st December, 1890 ...	0	6	0	[1a.]
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899	3	0	0	[6a.]
Act V of 1883 (Indian Merchant Shipping), as modified up to 1st December, 1904	0	6	0	[1a.]
Act VIII of 1883 (Little Cocos and Preparis Island), as modified up to 1st October, 1902	0	1	3	[1a.]
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902	0	11	0	[2a.]
Act IV of 1884 (Explosives), as modified up to 1st December, 1903	0	4	9	[1a.]
Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891	0	9	0	[2a.]
Act VII of 1884 (Steam-ships), as modified up to 1st July, 1890...	0	6	0	[1a.]
Act XII of 1884 (Agriculturists' Loans), as modified up to 15th December, 1896 (with footnotes brought down to 1st February, 1903)	0	2	0	[1a.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899	0	7	0	[1a.]
Act XIII of 1885 (Indian Telegraph), as modified up to 1st March, 1905	0	5	0	[1a.]
Act II of 1886 (Income-tax), as modified up to 1st April, 1903...	0	8	0	[1a. 6p.]
Act VI of 1886 (Births, Deaths, and Marriages Registration), as modified up to 1st June, 1891	0	6	0	[1a.]

Maharajah and the defendant, by which, according to the usual custom and practice of the family, certain properties known as Pargana Bachur were given by the late Maharajah to the defendant to have and to hold the same as a maintenance or *babuana* grant with the same incidents as are usually attached to *babuana* grants made to junior members of the said Raj family

In his argument before us, Counsel for the plaintiff relied upon the deed effecting this arrangement, and which is appended to the written statement, though not set forth in the plaint The Raj admittedly is an impartible estate, and being an impartible estate the defendant could not have separated so far as the Raj is concerned, from the late Maharajah All interest, the defendant could then claim in the Raj, was a *spes successionis* which was clearly not a subject for partition. In the suit brought by the defendant against the late Maharajah the question raised was whether the Raj was partible or not, and the compromise was based on the condition that the defendant withdrew that plea and not that the defendant accepted the terms offered as compensation for the rights which he had in the Raj, which in fact was then only a *spes successionis* There was nothing to separate.

With respect to the case that succession to the property of the Raj is governed by the rule of ordinary primogeniture, and not by the rule of lineal primogeniture, it was conceded that, whether the succession to the Raj was according to the rule of ordinary primogeniture or that of lineal primogeniture, the plaintiff cannot succeed unless he can show that the defendant separated in estate from his brother, the late Maharajah. But if it was an impartible estate there was nothing upon which separation of estate could operate.

I now pass to the question of amendment. The suit was set down for settlement of issues. Counsel for the plaintiff admitted that without amendment, the plaint disclosed no cause of action. It is not clear what the proposed amendments were, nor is it clear that leave to amend was ever asked for: if it were admitted that the plaint as it stood disclosed no cause of action and an amendment was asked for, it would have been

	Rs.	A.	P.	
Act XV of 1877 (Limitation), as modified up to 31st December, 1900	0	12	0	[2a.]
Act VI of 1878 (Treasure Trove), as amended by Act XII of 1891	0	2	6	[1a.]
Act VII of 1878 (Forests), as modified up to 1st December, 1903	0	10	0	[2a.]
Act VIII of 1878 (Sea Customs), as modified up to 1st February, 1904	1	5	3	[4a.]
Act XI of 1878 (Arms), as to modified up to 1st May, 1904	0	6	0	[1a. 6p.]
Act XVII of 1878 (Ferries), as modified up to 1st June, 1902	0	6	0	[1a. 6p.]
Act XVII of 1879 (Dekkhan Agriculturists' Relief), as modified up to 1st March, 1895	0	10	0	[2a.]
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896	0	7	6	[1a.]
Act VII of 1880 (Merchant Shipping), as modified up to 15th October, 1891	0	10	0	[1a.]
Act V of 1881 (Probate and Administration), as modified up to 1st July, 1890	0	12	0	[2a.]
Act XV of 1881 (Factories), as modified up to 1st December, 1904	0	5	6	[1a. 6p.]
Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st August, 1897	0	10	0	[1a.]
Act XVIII of 1881 (Central Provinces Land-revenue), as modified up to 1st March, 1905	1	2	0	[2a.]
Act II of 1882 (Trusts), as modified up to 1st June, 1903	0	10	0	[1a.]
Act IV of 1882 (Transfer of Property), as modified up to 1st December, 1905	0	15	0	[2a.]
Act V of 1882 (Indian Easements), as amended by the Repealing and Amending Act, 1891 (XII of 1891)	0	8	0	[1a.]
Act XII of 1882 (Salt), as modified up to 1st December, 1890	0	6	0	[1a.]
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899	3	0	0	[6a.]
Act V of 1883 (Indian Merchant Shipping), as modified up to 1st December, 1904	0	6	0	[1a.]
Act VIII of 1883 (Little Cocos and Preparis Island), as modified up to 1st October, 1902	0	1	8	[1a.]
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902	0	11	0	[2a.]
Act IV of 1884 (Explosives), as modified up to 1st December, 1903	0	4	9	[1a.]
Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891	0	9	0	[2a.]
Act VII of 1884 (Steam-ships), as modified up to 1st July, 1890	0	6	0	[1a.]
Act XII of 1884 (Agriculturists' Loans), as modified up to 15th December, 1896 (with footnotes brought down to 1st February, 1903)	0	2	0	[1a.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899	0	7	0	[1a.]
Act XIII of 1885 (Indian Telegraph), as modified up to 1st March, 1905	0	5	0	[1a.]
Act II of 1886 (Income-tax), as modified up to 1st April, 1903	0	8	0	[1a. 6p.]
Act VI of 1886 (Births, Deaths, and Marriages Registration), as modified up to 1st June, 1891	0	6	0	[1a.]

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W Maclean, K.C I E, Chief Justice and Mr. Justice Brett.

1909
Feb. 15.

In re MAUD ANDERSON.*

Insolvency—Indian Insolvent Act (11 and 12 Vict. c 21)—Jurisdiction—Summary proceeding—Order for Ejectment of insolvent Tenant, on application of Landlord, whether valid.

On an application by the insolvent's landlord, who was an admitted creditor in respect of arrears of rent, for an order that the insolvent should make over possession of the premises to the Official Assignee.—

Held, that there was nothing in the Insolvent Act, which enabled the Court, sitting in Insolvency, on a summary proceeding, to make at the instance of the landlord, what was virtually an order for ejectment against the tenant.

APPEAL by the insolvent, Maud Anderson.

THIS was an appeal by the insolvent, Maud Anderson, from an order of Sharfuddin J., dated the 21st September 1908, and a subsequent order of Fletcher J., dated the 18th November 1908.

It appears that Miss Maud Anderson, a boarding house-keeper, was for some time prior to and at the time of her insolvency a monthly tenant of the premises No. 77, Dhurrumtollah Street belonging to one Baloram Das at a rent of Rs. 300. On the 4th August 1908, she filed her petition in Insolvency, and on the same day, a vesting order was made, vesting all her property in the Official Assignee. Her schedule showed her total liability at Rs. 2,952, out of which the sum of Rs. 2,479 was set out as due to the landlord for arrears of rent.

On the 1st September 1908, Baloram Das called upon the insolvent to make over possession of the premises immediately. On her failure to do so, on the 7th September 1908, he made an application, before the Commissioner in Insolvency, alleging that more than Rs. 3,000 was due for arrears of rent, out of which he had obtained decrees for rent amounting to Rs. 2,843, and praying for " an order that the

* Appeal from Original Civil, No 63 of 1908.

	Rs. A. P.	
Regulation VI of 1886 (Ajmer Rural Boards), as modified up to 1st February, 1897	0 5 6	[1a.]
Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1891	0 5 0	[1a.]
Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899	0 4 9	[1a.]
Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902	0 6 0	[1a.]

III.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor-General of India in Council from 1854 to 1904.

Regulations made under the Statute 33 Vict., Cap. 3, from No. II of 1875 to 1904. 8vo, stitched.

[The above may be obtained separately. The price is noted on each.]

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

		Rs. A. P.	
Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893, with footnotes brought down to 1st December, 1901	In Urdu ...	0 2 6	[1a.]
Act XX of 1847 (Copyright), as modified up to 1st May, 1896	In Urdu ...	0 1 8	[1a.]
	" Nagri ...	0 1 8	[1a.]
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	In Urdu ...	0 0 6	[1a.]
	" Nagri ...	0 0 6	[1a.]
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	In Urdu ...	0 0 6	[1a.]
	" Nagri ...	0 0 6	[1a.]
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904 ...	In Urdu ...	0 0 3	[1a.]
	" Nagri ...	0 0 3	[1a.]
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903	In Urdu ...	0 0 6	[1a.]
	" Nagri ...	0 0 6	[1a.]
Act XX of 1856, as modified up to 1st November, 1903...	In Urdu ...	0 2 6	[1a.]
	" Nagri ...	0 2 6	[1a.]
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903 ...	In Urdu ...	0 1 0	[1a.]
	" Nagri ...	0 1 0	[1a.]
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903 ...	In Urdu ...	0 1 0	[1a.]
	" Nagri ...	0 1 0	[1a.]
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	In Urdu ...	0 1 6	[1a.]
Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874 ...	In Urdu ...	0 0 3	[1a.]
	" Nagri ...	0 0 3	[1a.]
Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December, 1904	In Urdu ...	0 0 8	[1a.]
	" Nagri ...	0 0 8	[1a.]
Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903	In Urdu ...	1 5 0	[5a.]
	" Nagri ...	1 5 0	[5a.]
Act V of 1861 (Police), as modified up to 7th March, 1903	In Urdu ...	0 2 9	[1a.]
	" Nagri ...	0 2 9	[1a.]

Official Assignee After the Official Assignee has taken possession it will be for him to decide what he will do with the property He may allow the insolvent to carry on business in the premises if he chooses, or he may ask the insolvent to vacate I direct the insolvent to make over possession within a week.

Thereupon, the insolvent requested the Official Assignee to allow her to reside in the premises, but the Official Assignee refused to do so, and appointed the 28th September 1908 for the insolvent to make over vacant possession of the premises to him, when he proposed to make over possession to the landlord. The insolvent failed to do so On the 13th November 1908, Baloram Das obtained a rule from the Insolvency Court calling upon the insolvent, "to shew cause why she should not carry out the order of the 21st September 1908, and why in default she should not be attached for contempt." On the 18th November 1908, the rule *nisi* of the 13th November 1908 was made absolute by Fletcher J and it was ordered that a writ of attachment do issue against the person of the insolvent on the 28th November, 1908, for disobedience of the order of the 21st September 1908.

The insolvent appealed under section 73 of the Insolvent Act from the order of Sharfuddin J , dated the 21st September 1908, and the contempt order of Fletcher J., dated the 18th November 1908

Mr. Avetoom, for the appellant. The Commissioner in Insolvency had no jurisdiction to make the order of the 21st September, 1908. It amounted to an order for ejectment at the instance of the landlord against the tenant. There is no provision in the Insolvent Act allowing of such an order being made. An order of this nature could only be made on the application of the Official Assignee.

The Advocate-General (*Mr. Sinha*) (*Mr. C. C. Ghose* with him), referred to *In re Finley, Ex parte Clothworkers' Company* (1) with reference to the practice prevailing in England. The landlord's position was one of hardship : the insolvent tenant neither could pay the rent, nor would she quit the premises. By.

(1) (1888) L. R. 21 Q. B. D. 475.

Act	Edition	Rs.	A.	P.	Postage
Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November, 1898	In Urdu	0	9	0	[1a. 6p.]
	" Nagri	0	9	0	[1a. 6p.]
Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1900	In Urdu	0	6	9	[2a.]
	" Nagri	0	6	9	[2a.]
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899	In Urdu	1	4	0	[6a.]
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902	In Urdu	0	4	9	[1a. 6p.]
	" Nagri	0	4	6	[1a. 6p.]
Act IV of 1884 (Explosives), as modified up to 1st May, 1896	In Urdu	0	1	3	[1a.]
	" Nagri	0	1	3	[1a.]
Act VI of 1884 (Inland Steam-Vessels), as modified up to 1st July, 1891	In Urdu	0	9	0	[2a.]
	" Nagri	0	9	0	[2a.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899	In Urdu	0	2	6	[1a.]
Act II of 1885 (Negotiable Instruments Amendment)	In Urdu	0	0	9	[1a.]
Act III of 1885 (Transfer of Property Amendment)	In Urdu	0	0	3	[1a.]
Act X of 1885 (Oudh Estates Amendment)	In Urdu	0	0	3	[1a.]
Act XIII of 1885 (Telegraph), as modified up to 1st March, 1905	In Urdu	0	1	6	[1a.]
Act XXI of 1885 (Madras Civil Courts Amendment)	In Urdu	0	0	3	[1a.]
Act II of 1886 (Income-tax), as modified up to 1st April, 1903	In Urdu	0	3	0	[1a. 9p.]
	" Nagri	0	3	0	[1a. 9p.]
Act IV of 1886 (Amending Section 265 of Contract Act)	In Urdu	0	0	3	[1a.]
Act VI of 1886 (Births, Deaths and Marriage Registration)	In Urdu	0	1	3	[1a.]
Act VII of 1886 (Registration Amendments)	In Urdu	0	0	3	[1a.]
Act X of 1886 (Criminal Law Amendment)	In Urdu	0	0	9	[1a.]
Act XI of 1886 (Tramways), as modified up to 31st December, 1900	In Urdu	0	3	3	[1a.]
	" Nagri	0	3	3	[1a.]
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891	In Urdu	0	0	9	[1a.]
	" Nagri	0	0	9	[1a.]
Act VI of 1887 (Companies Amendment)	In Urdu	0	0	3	[1a.]
Act VII of 1887 (Suits Valuation)	In Urdu	0	0	9	[1a.]
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896	In Urdu	0	2	3	[1a.]
	" Nagri	0	2	6	[1a.]
Act X of 1887 (Native Passenger Ships)	In Urdu	0	1	6	[1a.]
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)	In Urdu	0	1	3	[1a.]
	" Nagri	0	1	3	[1a.]
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899	In Urdu	0	3	6	[1a.]
	" Nagri	0	3	6	[1a.]
Act XV of 1887 (Burma Military Police)	In Urdu	0	0	9	[1a.]
	" Nagri	0	0	9	[1a.]
Act XVIII of 1887 (Allahabad University)	In Urdu	0	1	0	[1a.]
Act III of 1888 (Police), as modified up to 1st March, 1893	In Urdu	0	0	6	[1a.]
Ditto (as passed)	In Nagri	0	0	6	[1a.]

Act which enable the Court sitting in Insolvency on a summary proceeding like the present to make virtually an ejectment decree, at the instance of a landlord, against his tenant. The appeal therefore succeeds and must be allowed with costs both here and in the Court of first instance. The order for committal must also be discharged. I regret the result, because I think the appellant has been too smart for the other side.

BRETT J. I agree.

Appeal allowed.

Attorney for the appellant: *N. B. Sarkar.*

Attorney for the respondent: *P. L. De.*

J. C.

Act		Rs.	A.	P.	
Act XIV of 1891 (Oudh Courts)	In Urdu ...	0	0	6	[1a.]
Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1898 and XII of 1900	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	6	[1a.]
Act II of 1892 (Christian Marriage Validation)	In Urdu ...	0	0	8	[1a.]
Act IV of 1892 (Bengal Court of Wards Amendment)	In Urdu ...	0	0	6	[1a.]
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment) ...	In Urdu ...	0	0	8	[1a.]
Act IV of 1893 (Partition)	In Urdu ...	0	0	8	[1a.]
Act I of 1894 (Land Acquisition) ...	In Urdu ...	0	2	8	[1a. 6p.]
	„ Nagri ...	0	1	6	[1a. 6p.]
Act III of 1894 (Criminal Procedure and Penal Codes Amendment)	In Urdu ...	0	0	8	[1a.]
Act V of 1894 (Civil Procedure Code Amendment)	In Urdu ...	0	0	3	[1a.]
	„ Nagri ...	0	0	3	[1a.]
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903	In Urdu ...	0	4	0	[1a.]
	„ Nagri ...	0	8	9	[2a.]
Act IX of 1894 (Prisons)	In Urdu ...	0	1	8	[1a.]
	„ Nagri ...	0	2	8	[1a.]
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment).	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	3	[1a.]
Act XII of 1895 (Companies—Memorandum of Association)	In Urdu ...	0	8	0	[1a.]
Act XIV of 1895 (Pilgrim Ships) ...	In Urdu ...	0	1	8	[1a.]
Act II of 1896 (Cotton Duties) ...	In Urdu ...	0	1	8	[1a.]
	„ Nagri ...	0	1	0	[1a.]
Act VI of 1896 (Indian Penal Code Amendment)	In Urdu ...	0	0	8	[1a.]
Act VIII of 1896 (Inland Bonded Warehouses)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act XII of 1896 (Excise), as modified up to 1st August, 1905	In Nagri ...	0	8	8	[1a.]
Act I of 1897 (Act XXXVII of 1850 Amendment)	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
Act II of 1897 (Criminal Tribes Act Amendment)	In Urdu ...	0	0	8	[1a.]
Act III of 1897 (Epidemic Diseases) ...	In Urdu ...	0	0	8	[1a.]
	„ Nagri ...	0	0	8	[1a.]
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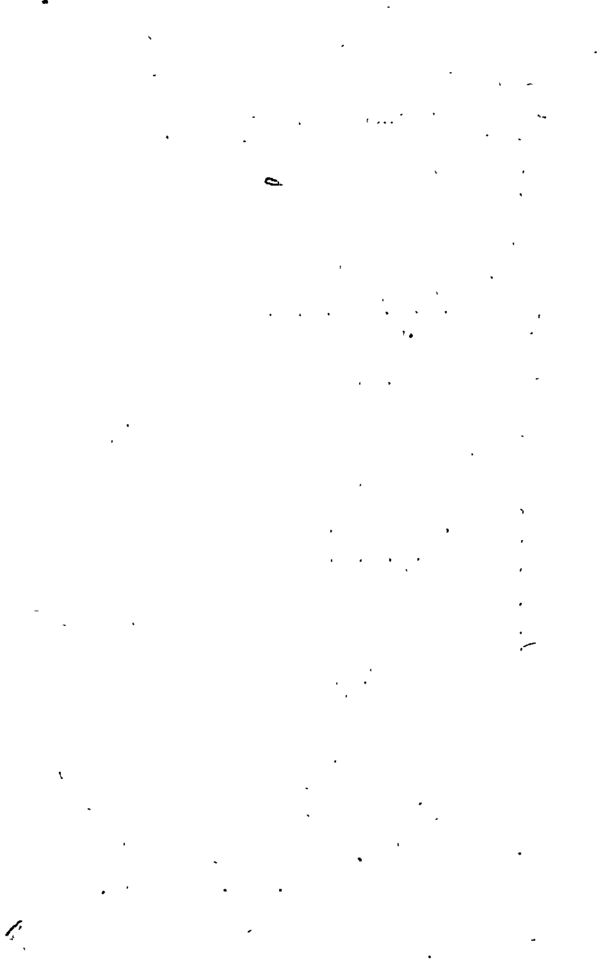
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	" Nagri ...	0	2	0	[1a.]
Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1902 ...	In Urdu ...	0	2	0	[1a.]
	" Nagri ...	0	2	0	[1a.]
Act XVIII of 1879 (Legal Practitioners) as modified up to 1st May, 1896	In Urdu ...	0	2	6	[1a.]
	" Nagri ...	0	2	6	[1a.]
Act XV of 1881 (Factories), as modified up to 1st April, 1891	In Urdu ...	0	1	6	[1a.]
	" Nagri ...	0	1	6	[1a.]



Act	Language	Rs.	A.	P.	
Act IV *of 1888 (Indian Reserve Forces)*, as modified up to 1st March, 1898	In Urdu ...	0	0	3	[1a.]
Ditto (as passed)	In Nagri ...	0	0	3	[1a.]
Act V of 1888 (Inventions and Designs) ...	In Urdu ...	0	2	3	[1a.]
Act VI of 1888 (Debtors)	In Urdu ...	0	0	6	[1a.]
	„ Nagri ...	0	0	6	[1a.]
Act VII of 1888 (Civil Procedure Amendment)	In Urdu ...	0	1	9	[1a.]
	„ Nagri ...	0	1	9	[1a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	In Urdu ...	0	0	6	[1a.]
	„ Nagri ...	0	0	6	[1a.]
Act II of 1889 (Measures of Length) ...	In Urdu ...	0	0	3	[1a.]
	„ Nagri ...	0	0	3	[1a.]
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904	In Urdu ...	0	1	9	[1a.]
	„ Nagri ...	0	2	0	[1a.]
Act VI of 1889 (Probate and Administration)	In Urdu ...	0	0	6	[1a.]
	„ Nagri ...	0	0	6	[1a.]
Act VII *of* 1889 (Succession Certificates) ...	In Urdu ...	0	1	6	[1a.]
Act X of 1889 (Ports), as modified up to 1st June, *1894*	*In Urdu* ...	0	5	0	[2a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895	In Urdu ...	0	2	3	[1a. 9p.]
	„ Nagri ...	0	3	0	[1a. 9p.]
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904	In Urdu ...	0	0	9	[1a.]
	„ Nagri ...	0	0	9	[1a.]
Act XVI of 1889 (Central Provinces Land Revenue)	In Urdu ...	0	1	6	[1a.]
	„ Nagri ...	0	1	6	[1a.]
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu ...	0	0	3	[1a.]
Act I of 1890 (Revenue Recovery) ...	In Urdu ...	0	0	3	[1a.]
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881)	In Urdu ...	0	0	3	[1a.]
Act V of 1890 (Indian Forest and Burma Forests Amendment)	In Urdu ...	0	0	6	[1a.]
Act VI of 1890 (Charitable Endowments)	In Urdu ...	0	0	6	[1a.]
Act VIII of 1890 (Guardians and Wards) ...	In Urdu ...	0	2	3	[1a. 9p.]
Act IX of 1890 (Railways), as modified up to 1st June, 1905	In Urdu ...	0	8	0	[2a.]
Act IX of 1890 (Railways), as modified up to 1st May, 1896	In Nagri ...	0	8	0	[2a.]
Act X of 1890 (Press and Registration of Books Amendment)	In Urdu ...	0	0	3	[1a.]
Act XI of 1890 (Prevention of Cruelty to Animals)	In Urdu ...	0	0	3	[1a.]
Act XVIII of 1890 (Emigration Amendment)	In Urdu ...	0	0	3	[1a.]
Act XIX of 1890 (Salt Amendment) ...	In Urdu ...	0	0	3	[1a.]
Act XX of 1890 (North-Western Provinces and Oudh)	In Urdu ...	0	1	0	[1a.]
Act V of 1891 (Ports Act Amendment) ...	In Urdu ...	0	0	3	[1a.]
Act X *of 1891* (Indian Criminal Law Amendment)	In Urdu ...	0	0	3	[1a.]

			Rs.	A.	P.	
Act XII of 1897 (Local Authorities Emergency Loans) ...	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act XV of 1897 (Cantonments)	In Urdu	...	0	0	8	[1a.]
Act I of 1898 [Stage-Carriages Act (1861) Amendment]	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act III of 1898 (Lepers)	In Urdu	...	0	0	6	[1a.]
	„ Nagri	...	0	0	6	[1a.]
Act IV of 1898 (Indian Penal Code Amendment)	In Urdu	...	0	0	8	[1a.]
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1900	In Urdu	...	1	4	0	[8a.]
	„ Hindi	...	1	6	0	[8a.]
Act VI of 1898 (Post Office)	In Urdu	...	0	2	0	[1a.]
	„ Nagri	...	0	2	0	[1a.]
Act IX of 1898 (Live-stock Importation)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act X of 1898 (Indian Insolvency Rules) ...	In Urdu	...	0	0	8	[1a.]
Act I of 1899 [Indian Marine Act (1887) Amendment]	In Urdu	...	0	0	6	[1a.]
	„ Nagri	...	0	0	6	[1a.]
Act II of 1899 (Stamp), as modified up to 31st August, 1905	In Urdu	...	0	7	0	[6p.]
	„ Nagri	...	0	7	0	[6p.]
Act III of 1899 (Prisoners), as modified up to 1st March, 1905	In Urdu	...	0	2	8	[1a.]
	„ Nagri	...	0	2	8	[1a.]
Act IV of 1899 (Government Buildings) ...	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act V of 1899 (Indian Evidence)... ...	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act VI of 1899 (Indian Contract Act Amendment)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment]	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act VIII of 1899 (Petroleum)	In Urdu	...	0	0	9	[1a.]
	„ Nagri	...	0	0	9	[1a.]
Act IX of 1899 (Arbitration)	In Urdu	...	0	0	9	[1a.]
	„ Nagri	...	0	0	9	[1a.]
Act XI of 1899 (Court-fees Amendment) ...	In Urdu	...	0	0	9	[1a.]
	„ Nagri	...	0	0	6	[1a.]
Act XII of 1899 (Currency Notes Forgery)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act *XIII of 1899 (Glanders and Farcy)* ...	In Nagri	...	0	2	0	[1a.]
Ditto, as modified up to 1st April, 1902 ...	In Urdu	...	0	3	0	[1a.]
Act XIV of 1899 (Tariff Amendment) ...	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act XVII of 1899 (Indian Registration Amendment)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act XVIII of 1899 (Land Improvement Loans Amendment)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act XX of 1899 (Presidency Banks) ...	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act XXI of 1899 (Central Provinces Tenancy Amendment)	In Urdu	...	0	0	8	[1a.]
	„ Nagri	...	0	0	8	[1a.]
Act XXIV of 1899 (Central Provinces Court of Wards)	In Urdu	...	0	1	8	[1a.]
	„ Nagri	...	0	1	8	[1a.]



		Rs.	A.	P.	
Act XV of 1903 (Extradition), as modified up to 1st December, 1904	In Urdu ...	0	1	9	[1a.]
	" Nagri ...	0	1	9	[1a.]
Act XVI of 1903 (Central Provinces Municipal)	In Urdu ...	0	4	0	[1a. 6p.]
	" Nagri ...	0	4	0	[1a. 6p.]
Act I of 1904 (Poisons)	In Urdu ...	0	0	6	[1a.]
	" Nagri ...	0	0	6	[1a.]
Act III of 1904 (Local Authorities Loan) ...	In Urdu ...	0	0	8	[1a.]
	" Nagri ...	0	0	8	[1a.]
Act IV of 1904 (North-West Border Military Police)	In Urdu ...	0	0	9	[1a.]
Act VI of 1904 [Transfer of Property (Amendment)]	In Urdu ...	0	0	8	[1a.]
	" Nagri ...	0	0	8	[1a.]
Act VII of 1904 (Ancient Monuments Preservation	In Urdu ...	0	0	9	[1a.]
	" Nagri ...	0	0	9	[1a.]
Act VIII of 1904 (Indian Universities) ...	In Urdu ...	0	1	8	[1a.]
	" Nagri ...	0	1	8	[1a.]
Act X of 1904 (Co-operative Credit Societies)	In Urdu ...	0	1	0	[1a.]
	" Nagri ...	0	1	0	[1a.]
Act XI of 1904 (to revive and continue section 8B of the Indian Tariff Act, 1894)	In Urdu ...	0	0	8	[1a.]
	" Nagri ...	0	0	8	[1a.]
Act XII of 1904 (Emigration)	In Urdu ...	0	0	8	[1a.]
	" Nagri ...	0	0	8	[1a.]
Act XIII of 1904 (Indian Articles of War)	In Urdu ...	0	0	8	[1a.]
	" Nagri ...	0	0	8	[1a.]
Act XV of 1904 [Indian Stamp (Amendment)]	In Urdu ...	0	0	8	[1a.]
	" Nagri ...	0	0	3	[1a.]
Act I of 1905 [Local Authorities Loan (Amendment)]	In Urdu ...	0	0	8	[1a.]
	" Nagri ...	0	0	3	[1a.]
Act II of 1905 [Indian Universities (Validation)]	In Urdu ...	0	0	3	[1a.]
	" Nagri ...	0	0	3	[1a.]
Act III of 1905 (Indian Paper Currency) ...	In Urdu ...	0	0	9	[1a.]
	" Nagri ...	0	0	9	[1a.]
Act IV of 1905 (Indian Railway Board) ...	In Urdu ...	0	0	3	[1a.]
Act VI of 1905 (Court-fees Amendment) ...	In Urdu ...	0	1	6	[1a.]
	" Nagri ...	0	0	8	[1a.]
Act VII of 1905 (Bengal and Assam Laws)	In Urdu ...	0	0	3	[1a.]
	" Nagri ...	0	0	3	[1a.]
Regulation I of 1890 (British Baluchistan Laws)	In Urdu ...	......			[1a. 6p.]
Regulation V of 1890 (British Baluchistan Forests)	In Urdu ...	0	2	0	[1a. 6p.]
Regulation VI of 1893 (Hazara Forests) ...	In Urdu ...	0	2	0	[1a. 6p.]
Regulation VIII of 1896 (British Baluchistan *Criminal Justice*) ...	*In Urdu* ...	0	0	9	[1a.]
Regulation IX of 1896 (British Baluchistan Civil Justice)	In Urdu ...	0	2	3	[1a.]
Regulation III of 1901 (Frontier Crimes) ...	In Urdu ...	0	2	6	[1a.]
Regulation IV of 1901 (Frontier Murderous Outrages)	In Urdu ...	0	0	6	[1a.]
Regulation VII of 1901 (North-West Frontier Province)	In Urdu ...	0	4	3	[1a.]

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SHYAM CHUNDER MARDRAJ v. SECRETARY OF STATE FOR INDIA.

now. We are not at present concerned with the legality of the proceedings of 1896.

But, even if the appellants had not raised this plea, we consider we would have been entitled of our own motion to enquire into the legality of the Collector's proceedings and of the reference: See *Ladli Begam* v. *Raje Rabia*(1).

The Government pleader finally calls our attention to the case of *Babu Jan* v. *Secretary of State for India*(2). In this case it has been said: "The matter being referred to the District Judge, at the instance of Babujan, who claimed to be the proprietor of the land; the Judge held that the Collector had no jurisdiction to deal with the case as he had done, and that he could not, therefore, entertain the reference. He, however, did not stop there, but went on to hold, that the Act did not apply to a case, in which the Collector claims the land, on behalf of the Government or the Municipality."

Mr. Forester was no doubt right in holding that the first proceedings and the reference thereunder were bad, because what has to be acquired in every case under the Land Acquisition Act, is the aggregate of rights in the land, and not merely some subsidiary right, such as that of a tenant.

These passages are, we think, in favour of the views we have expressed. They show (*i*) that what is to be acquired in every case under the Act is the aggregate of rights in the land, and not merely some subsidiary right, as in this case, fishery rights; (*ii*) that it is the duty of the Civil Court to set aside proceedings of, and a reference by, the Collector, which are bad, being contrary to the provisions of the Act.

We accordingly decree this appeal. We set aside the proceedings of, and the reference by, the Collector in this case. The appellants are entitled to all their costs in both Courts.

Appeal allowed.

A. W. H.

(1) (1888) I. L. R. 13 Bom. 650.

(2) (1906) 4 C. L. J. 256.

INDEX.

1908

NATABAR GHOSE
v.
EMPEROR.

The Deputy Legal Remembrancer (Mr. Orr) for the Crown.

GEIDT J. The appellants have been convicted by the Additional Sessions Judge of Hooghly sitting at Howrah with a Jury, Natabar of the offence of culpable homicide not amounting to murder, and the other three appellants of that offence read with section 149 of the Indian Penal Code. Three of the appellants have also been convicted of rioting armed with a deadly weapon, and the fourth simply of rioting, and they have been sentenced to various terms of imprisonment.

It is urged on their behalf that there has been material misdirection of the Jury. The Sessions Judge, when dealing with the questions which the Jury had to consider, after stating the case for the prosecution, went on to observe as follows: "In dealing with a charge of culpable homicide you have first of all to see whether a man is dead, and whether he met with a violent end," and then the Sessions Judge referred to the medical evidence showing that the man had met with a violent death. The Sessions Judge goes on to say: "The question now is, had the accused any hand in causing this man's death, also, whether they formed members of an unlawful assembly in furtherance of the common object, for which this act was committed."

It appears to me that these were not the only questions, which the Jury had to consider. There was one very important further question, to which the Sessions Judge has omitted reference altogether, namely, the question whether, in causing the death of the deceased, the accused had the intention to cause death, or such injury as was likely to cause death, or the knowledge that he was likely to cause death. This was a question on which the Jury were bound to come to a finding before they could convict the appellant of culpable homicide. It is true that in the first part of his charge the Sessions Judge explained the sections of the Penal Code defining "murder" and "culpable homicide," and he pointed out to them the distinction between the two. But in my opinion that was not sufficient. When laying before the Jury the questions, which they had to consider, it was his duty to lay specifically before them the question I have



1908

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1908

NATABAR GHOSE v. EMPEROR.

GEIDT J.

as a whole before the Jury; if it was not evidence, it was equally his duty to have abstained from any reference to it altogether.

In my opinion there has been material misdirection of the Jury. The convictions and sentences must, therefore, be set aside and a new trial ordered.

WOODROFFE J. I agree.

Re-trial ordered.

E. H. M.



1908

CHANDRA NATH DAS v. KALI-PRASANNA CHAKRAVARTI.

dismissed on the date fixed for hearing or later on. The respondents may appear notwithstanding service of notice from Court. The deposit was accepted by the office and there was sufficient time to serve notice upon the respondents. The dismissal was illegal and unjust, and, if it is held to be so, the later order rejecting the petition for re-admission is also wrong.

Babu Rajendra Chandra Guha for the respondents.

BRETT AND DOSS JJ. This is an appeal against an order of the District Judge of Dacca dismissing an application for revival of an appeal, which had been dismissed for default on the 18th August, 1906.

It appears that the appeal was registered on the 28th July 1906, and an order was passed that notices should issue on the respondents on payment of costs within ten days; and the 1st September was the date fixed for the hearing. On the 16th August 1906 a report appears to have been made to the District Judge that the *talabana* had been paid in on the previous day and the Judge accordingly called upon the pleader for the appellants to explain why the order passed on the 28th July, which directed that costs should be paid within ten days, had not been complied with. As the explanation offered was not in the opinion of the District Judge sufficient, he on the 18th August 1906 dismissed the appeal for default; and on the 17th September 1906 rejected the application for revival of the appeal.

In our opinion the District Judge failed to exercise a wise discretion and has erred in law in dismissing the appeal on the 18th August 1906, that is, before the date fixed for the hearing of the appeal had arrived, and before too it had been ascertained that the notice to the respondents could not have been served by the date fixed for the hearing in consequence of the failure on the part of the appellants to deposit the necessary fees for issue of notices within the time fixed by the Court (Section 557 of the Civil Procedure Code). The order dismissing the appeal for default cannot, in our opinion, be sustained, and therefore the order rejecting the application for revival of the appeal must also be set aside.

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Coxe.

1908
Feb. 18.

ISWARDHARI SINGH
v.
SAHEBZADI.*

Appellate Court, power of—Alternative relief—Contending defendants—Practice.

If in a mortgage-suit, in which the plaintiffs ask for relief against two sets of defendants in the alternative, the first Court gives a decree against one set of defendants and dismisses the suit as against the other, the Appellate Court has, on appeal by one set of defendants, in which the other set of defendants is made a party respondent, power to alter the decree, so as to make the latter liable, the real contest in the case being between the defendants.

Upendra Lal Mukerjee v. *Girindra Nath Mukerjee*(1), *Hudson* v. *Basdeo Bajpye*(2) and *Rupjaun Bibee* v. *Abdul Kadir Bhuyan*(3) followed.

SECOND APPEAL by Iswardhari Singh and others, the plaintiffs Nos. 1 to 4.

The plaintiffs instituted this suit in the Court of the Subordinate Judge of Mozufferpur against the defendants for the recovery of Rs. 3,930 on account of principal and interest, due under a deed of mortgage dated the 8th January 1891.

The defendant No. 1 was a *pardanashin* lady and the deed was executed on her behalf by her brother, who was her *am-muktear* The brother and the mortgagee were both dead; and the heirs of the mortgagee sued the lady, as well as the heirs of the brother, as being liable in the alternative. The Court of first instance dismissed the suit as against the lady, defendant No. 1, but gave a money decree against the other defendants Nos. 2 to 8, as the legal heirs and representatives of the deceased brother.

* Appeal from Appellate Decree, No. 1638 of 1905, against the decree of E. P. Chapman, District Judge of Mozafferpore, dated May 2, 1905, reversing the decree of Rajendra Nath Dutt, Subordinate Judge of Mozafferpore, dated Sept. 29, 1904.

(1) (1898) I. L. R. 25 Calc. 565.
(2) (1898) I. L. R. 26 Calc. 109.
(3) (1904) I. L. R. 31 Calc. 643.



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ISWARDHARI SINGH v. BIBI SAHEBZADI.

Rup Jaun Bibee v. *Abdul Kadir Bhuyan*(1), are sufficient authority for the view, which we take, that in an appeal like the present by defendants Nos. 2 to 8 against the decision of the Court of first instance, in which the real contest in the case was whether defendant No 1, who was joined as respondent with the plaintiffs, or defendants Nos. 2 to 8, who were the appellants, were liable for the mortgage debt, the Appellate Court has power to alter the decree of the Court of first instance so as to make defendant No. 1, who was a joint respondent in the appeal with the plaintiffs, liable, and to direct that a decree to recover the mortgage debt against her be granted in favour of the plaintiffs.

The case of *Bishun Churn Roy Chowdhury* v. *Jogendra Nath Roy*(2), on which the learned Judge has relied, does not lay down a different principle. It is true the other cases, to which we have referred, are suits for contribution, but we are of opinion that the principle laid down in those cases must be taken to apply equally to a case like the present.

We therefore set aside the judgment and decree of the Lower Appellate Court and in lieu thereof direct that a mortgage decree in the ordinary form be granted to the plaintiffs to recover the sum due under the mortgage from defendant No. 1. An account will be taken of the amount due on the mortgage bond and on defendant No. 1's failing to pay the sum due within six months from the date of this decree the plaintiffs will be entitled to recover the sum from defendant No. 1 by sale of the property.

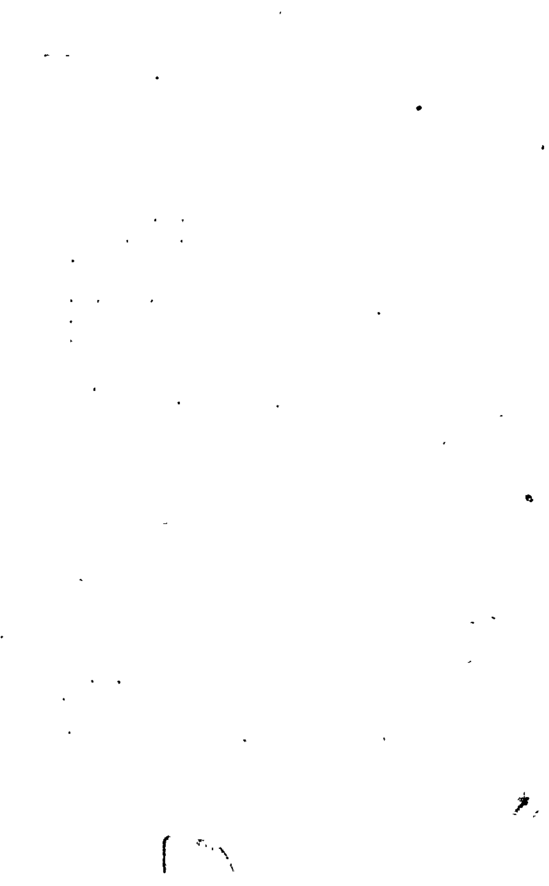
The plaintiffs are entitled to recover their costs in this appeal and in the lower Courts from defendant No. 1.

Defendants Nos. 2 to 8 are also entitled to their costs of this appeal, as well as to the costs in the Lower Appellate Court, which costs must be paid by defendant No. 1, against whom, more than against the plaintiffs, the appeal was directed.

Appeal allowed.

S. C. B.

(1) (1904) I. L. R. 31 Calc. 643 (2) (1898) I. L. R. 26 Calc. 114.



1908

VENKATA SA BAROD v. MAKSUDAN DAS.

Babu Tarak Chandra Chakravarti for the plaintiff took a preliminary objection that the High Court had no jurisdiction to decide this matter, as the application for reference was not by one of the parties to this Court, as contemplated by s. 24 of the Civil Procedure Code.

Babu Makhamlal for the defendant relied on s. 20 and s. 12 of the Civil Procedure Code. He also cited *Meckjee Khetsee* v. *Kaosucjee Devachund*(1).

[MACLEAN, C. J. S. 24 does not deal with stay of proceedings.]

Babu Tarak Chandra Chakravarti for the plaintiff. S. 24 does not contemplate stay, but transfer. The Reference is also for transfer. An objection under s. 12 cannot be considered by the Court summarily, as in this Reference. In the case of s. 12, the Court would of its own accord stop one suit.

[COXE J. Do ss. 20 to 24 apply to such cases, *viz.*, where there are two suits?]

MACLEAN C. J. AND COXE J. We have considered the matter referred to us, and we think that under the conjoint operation of sections 20 and 24 of the Code of Civil Procedure, we ought to determine, as we do, that the suit in the Court of Benares should proceed. It follows from this that in the meantime the proceedings in the Munsif's Court at Jangipur will be stayed.

Proceedings stayed.

S. M.

(1) (1879) 4 C. L. R. 282.

1907

SHYAM CHUNDER MARDRA v. SECRETARY OF STATE FOR INDIA

in which it is said that "a person shall be deemed to be interested in land, if he is interested in an easement "affecting the land." This is no doubt correct, but it does not follow that, because a person interested in an easement affecting the land may be entitled to share in the compensation awarded for the land, that an easement comes within the definition of land and can be acquired under the Act, detached from the land affected by it.

The Government pleader has further explained that after

NOTE TO BINDER.

These pages should be substituted for pages 529, 530 in the June number of the Reports.

the trouble and danger of dealing with the settlement holders and their transferees, it has adopted the plan of taking the fishery rights up under the Act.

In our opinion, though it is doubtless convenient to it to do so, Government cannot for the two reasons already assigned adopt this course.

The Government pleader's next argument is that the parties interested have only contested the amount of compensation awarded. This is not so, for all the claimants in their written statements plead that "by contesting the amount of compensation, they are not in any way waiving their right of questioning the land acquisition proceedings in the Civil Court on the ground that these fisheries cannot be legally acquired under Act I of 1894." Again, in their memorandum of appeal to this Court, their second ground of appeal is:—"that the Court below should have held that the right to fishery in respect of the space between the high water and low water mark, being neither land nor profit arising out of land, the subject-matter is beyond the scope of the Land Acquisition Act and it cannot thus be acquired." Mr. Casperez, too for the appellants, contends that the proceedings of the Deputy Collector are without jurisdiction. He goes further; for he asserts that the proceedings of 1896 are illegal and that Government could not then legally acquire under the Act the foreshore off Chandipur. We need not enter into that question

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(Bengal Act I of 1907), I got a vested right to save the property by depositing the money under s. 310A of the Civil Procedure Code: see *Jogodanund Singh* v. *Amrita Lal Sircar*(1), *Chandra Kumar Nath* v. *Kamini Kumar Ghose*(2) is exactly in point and in my favour.

Babu Atul Krishna Ray, in reply. By the Bengal Tenancy Act, s. 107, cl. (2) the opposite party could have paid and saved the property. There is no saving clause in the amending Act of 1907: see also *Abed Mollah* v. *Diljan Mollah*(3), which is in my favour. *Paresh Nath Singha* v. *Nabogopal Chattopadhya*(4) and *Narain Mandal* v. *Sourindra Mohan Tagore*(5) cited by the other side are distinguishable. There cannot be a vested right in one, who was no party to the former proceedings.

MACLEAN C. J. This is an application under section 622 of the Code of Civil Procedure, to discharge an order of the Munsif of Basirhat, dated the 16th of July 1907, by which he gave an under-raiyat liberty to pay in the purchase-money under section 310A of the Code of Civil Procedure. The auction-purchaser applied for a Rule to discharge that order on the ground that the Judge had no jurisdiction to make it: and a Rule was granted.

It appears now that the application, upon which the order of the Judge was passed, was made on the 23rd of May 1907. But on the previous day, the 22nd of May 1907, the amending Bengal Tenancy Act (Act I of 1907) came into operation, and, by section 54, amending section 170 of the existing Bengal Tenancy Act, it was enacted that the words "310A" should be inserted in section 170. The effect of that amendment was to prevent any order being passed under section 310A of the Code: and, if the matter had rested there, the Rule must have been made absolute. Whilst the opposite party concedes that, it is urged that he is protected under section 8, subsection (c) of the Bengal General Clauses Act (Act I of 1899). That section

(1) (1895) I. L. R. 22 Calc. 767.
(2) (1907) 11 C. W. N. 742.
(3) (1903) I. L. R. 29 Calc. 459.
(4) (1901) I. L. R. 29 Calc. 1.
(5) (1904) I. L. R. 32 Calc. 107.

APPELLATE CRIMINAL.

Before Mr. Justice Geidt and Mr. Justice Woodroffe.

1908
March 17

NATABAR GHOSE
v.
EMPEROR.*

Jury, trial by—Misdirection—Culpable homicide—Proper charge in case of culpable homicide—Direction as to truth of plea of accused—Misrepresentation as to the effect of medical evidence—Expression of opinion by Judge.

The omission by the Judge to lay specifically before the Jury, in a case of culpable homicide, the question whether in causing death the accused had the intention to cause death or such injury as was likely to cause death, or the knowledge that he was likely to do so, though in the earlier part of the charge he had explained generally the terms "murder" and "culpable homicide" and had pointed out the distinction, is a material misdirection.

The omission to direct the Jury to consider the truth of the plea of some of the accused that they were not present at the occurrence, before convicting them, is a misdirection.

Misrepresentation of the effect of the medical evidence is a misdirection.

It is a misdirection for the Judge to express his opinion on various questions of fact without telling the Jury that his opinion is not binding on them and that they are the sole judges of fact.

THE appellants were tried before the Assistant Sessions Judge of Hooghly, sitting with a Jury, and unanimously convicted Natabar under ss. 148 and 304 of the Penal Code, Toosto under ss. 147 and $\frac{304}{149}$ and the others under ss. 148 and $\frac{304}{149}$.

The Judge accepting the verdict of the Jury sentenced the first appellant to six years', and the rest to four years' imprisonment each.

The accused appealed to the High Court.

Mr. Mahmoodul Huq and *Babu Nogendra Nath Bhattacharjee* for the appellants.

* Criminal Appeal No. 75 of 1908 against the Order of S. B. Bhuttacharjee, Additional Sessions Judge of Hooghly, dated Nov. 22, 1907.

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no application. No doubt, this Court has held, although there is some difference of opinion upon the point, that applications under section 310A may properly be made, where a tenure or holding has been attached in execution of a decree for arrears due thereon under the Bengal Tenancy Act. But for the reasons I have pointed out, there was no enactment to that effect under the Bengal Tenancy Act of 1885: nor could there have been any such, because, as I have said, the section was not then in existence.

For these reasons, I think the point taken by the opposite-party cannot prevail: and as it has been expressly enacted that section 310A was not to apply to a tenure or holding attached in execution of a decree for arrears due thereon, before the application to deposit the purchase-money was made, the Rule must be made absolute with costs.

COXE J. I agree.

Rule absolute.

S. M.

indicated, and to tell them that, before they could find the accused guilty of culpable homicide, they must find that the accused had either the intention or knowledge which I have mentioned above. It appears to me that in this matter there has been a very material misdirection of the Jury.

In some other respects also the charge is not satisfactory. The accused Nos. 2 and 4 pleaded that they had not been present at the occurrence. The Sessions Judge does refer in the beginning of his charge to the plea, but omits all reference to it in the subsequent part of his charge, and he does not tell the Jury, as he ought to have told them, that, with reference to the accused Nos. 2 and 4, they must, before they convict them, find that they were present at the occurrence.

Then again the Sessions Judge has, in my opinion, somewhat misrepresented the effect of the medical evidence. The Assistant Surgeon, who examined the two accused persons, Natabar and Toosto, deposed that the wounds on them might have been self-inflicted. The Sessions Judge has represented this evidence as showing that the opinion of the Assistant Surgeon was that they were self-inflicted, and though he afterwards used the expression that in the Civil Surgeon's opinion the wounds could be self-inflicted, he said that this was an opinion which militated against the evidence for the defence.

Then again the charge is unsatisfactory in that the Sessions Judge has expressed his opinion on various questions of fact arising in this case without telling the Jury that his opinion was not binding on them, and that they were the sole judges of fact. He has made no reference to the separate function of the Jury as the sole judges of fact.

There is one other point to which I may refer, namely, the matter of the First Information. The First Information seems to have been proved by the Sub-Inspector, but it was apparently not read out to the Jury. The learned Sessions Judge in his charge has commented on that First Information, but counsel for the appellants contends that the contents of that First Information have been misrepresented by the Sessions Judge. Whether that was so or not, it was clearly the duty of the Sessions Judge, if that First Information was properly evidence, to have placed it

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SHILABATI DEBI v. RODERIGUES.

MACLEAN C.J.

Babu Manmatha Nath Mukherji for the petitioner. No appeal lay to anybody. The plaintiff, having abandoned his claim to a certain extent and reduced his claim to Rs. 7-8, cannot again fall back on the original value of the suit. On the question whether an appeal lay, see *Ram Mohan Mohish* v. *Badan Barai*(1); *Dena Bandhu Nandi* v. *Nobin Chundra Kur*(2).

Hon'ble Dr. Rash Behary Ghose for the opposite party. The plaintiff abandoned part of his claim with permission of the Court to bring a separate suit. It is not suggested that the original claim was a fraudulent one. See *Mahabir Singh* v. *Behari Lal*(3).

Supposing the suit, as originally filed, was dismissed, could there be no appeal? Then there is the question, whether the Munsif had jurisdiction to try the suit finally under s. 153 (*b*) of the Bengal Tenancy Act. When he was empowered with special powers under s. 153 (*b*), he was a Munsif at Baruipur and not at Hooghly. These powers once conferred do not absolutely vest in the Munsif. These powers rather follow a Munsif. [COXE J. You mean that he was not empowered afresh? That is never done.] There has been no injustice in this case, and under s. 622 of the Civil Procedure Code your Lordships may refuse to interfere.

MACLEAN C.J. This is an application under section 622 of the Code of Civil Procedure, in which a Rule has been granted, and the object of the Rule is to have the decree of the District Judge of Hooghly, dated the 10th of May, 1907, set aside on the ground that he had no jurisdiction to pass such a decree.

The suit was one for rent, and originally it was for a sum amounting to Rs. 117-6; but when the matter came on for trial in the Munsif's Court, the plaintiff put in a petition withdrawing his claim to certain increased rent on the ground of alteration of area and asking for leave to bring a fresh suit for that: and that application apparently was granted, the result of which was to reduce his claim in the present suit to one for rent amounting only to Rs. 7-8. The Munsif held that the

(1) (1903) 8 C. W. N. 436. (2) (1903) 8 C. W. N. 437.
(3) (1891) I. L. R. 13 All. 320.

indicated, and to tell them that, before they could find the accused guilty of culpable homicide, they must find that the accused had either the intention or knowledge which I have mentioned above. It appears to me that in this matter there has been a very material misdirection of the Jury.

In some other respects also the charge is not satisfactory. The accused Nos. 2 and 4 pleaded that they had not been present at the occurrence. The Sessions Judge does refer in the beginning of his charge to the plea, but omits all reference to it in the subsequent part of his charge, and he does not tell the Jury, as he ought to have told them, that, with reference to the accused Nos. 2 and 4, they must, before they convict them, find that they were present at the occurrence.

Then again the Sessions Judge has, in my opinion, somewhat misrepresented the effect of the medical evidence. The Assistant Surgeon, who examined the two accused persons, Natabar and Toosto, deposed that the wounds on them might have been self-inflicted. The Sessions Judge has represented this evidence as showing that the opinion of the Assistant Surgeon was that they were self-inflicted, and though he afterwards used the expression that in the Civil Surgeon's opinion the wounds could be self-inflicted, he said that this was an opinion which militated against the evidence for the defence.

Then again the charge is unsatisfactory in that the Sessions Judge has expressed his opinion on various questions of fact arising in this case without telling the Jury that his opinion was not binding on them, and that they were the sole judges of fact. He has made no reference to the separate function of the Jury as the sole judges of fact.

There is one other point to which I may refer, namely, the matter of the First Information. The First Information seems to have been proved by the Sub-Inspector, but it was apparently not read out to the Jury. The learned Sessions Judge in his charge has commented on that First Information, but counsel for the appellants contends that the contents of that First Information have been misrepresented by the Sessions Judge. Whether that was so or not, it was clearly the duty of the Sessions Judge, if that First Information was properly evidence, to have placed it

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not, after his transfer to Hooghly, exercise the power, which had been conferred upon him, when he was a Munsif of Baruipur, and that fresh power ought to have been specially conferred upon him. I understand that for many years the practice has been in such and similar cases not to confer any fresh power and that it has always been regarded that the power, having once been conferred, remains vested in the judicial officer in question notwithstanding he has been transferred from one district to another. It is very difficult for us, considering that many decisions have undoubtedly been based upon this view, which has been held for very many years, now to interfere. I am bound to say, speaking for myself, that, looking at the language of sub-section (*b*) of section 153, there is nothing in it to suggest that, when a judicial officer has once been specially empowered by the Local Government to exercise final jurisdiction under the section, that power determines, because he is transferred to another district, or that any necessity exists that he should again be specially empowered by reason of such transfer.

For these reasons, I think the Rule must be made absolute with costs.

COXE J. I agree.

Rule absolute.

B. M.

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Doss.

CHANDRA NATH DAS

v.

KALIPRASANNA CHAKRAVARTI.*

1908
March 4.

Appeal—Appeal, when to be dismissed for default—Talabana—Talabana, not paid within the time ordered—Civil Procedure Code (Act XIV of 1882), s. 557.

An appeal should not be dismissed for default before the date fixed for the hearing of the appeal arrives, simply because the appellant has failed to explain satisfactorily, why the *talabana* was not deposited within the period fixed by the Court and without ascertaining, whether there was ample time after the deposit to serve the notices upon the respondents.

APPEAL by the petitioners for re-admission of appeal.

One Chandranath Das and others filed an appeal in the Court of the District Judge of Dacca, which was registered on the 28th July 1906, and on the same day the order was passed "issue notice on payment of costs within 10 days. Fix 1st September for hearing." The *talabana* was not however filed before the 15th August, 1906. On the 16th, the District Judge called upon the pleader to explain the delay. On the 18th August, the explanation was given, viz., that the appellants did not come earlier, although they were told that the *talabana* had to be paid within ten days from the 28th July last.

The appeal was dismissed for default the same day.

On the 15th September following, the appellants prayed for re-admission of the appeal on the ground that the dismissal before the date fixed for the hearing of the appeal was illegal, and that owing to poverty they could not raise sufficient money to deposit the *talabana* within the period fixed by the Court.

The petition was rejected on the 17th September, 1906.

Babu Upendralal Roy for the appellants. Section 557 of the Code is clear in its terms and states that the appeal can be

* Appeal from Original Order No. 543 of 1906, against the order of H. Walmsley, District Judge of Dacca, dated 17th September 1906.

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PETHERPERMAL CHETTY
v.
MUNIANDY SERVAI.

(March 7th, 1904) of the Court of the District Judge of Hanthawaddy.

The defendant was the appellant to His Majesty in Council.

The principal questions raised on this appeal related to the validity and legal effect of a deed of sale dated 11th June, 1895, and of a deed of release, dated 30th July, 1897, both of which the plaintiff (the respondent) contended were void and inoperative as against him.

One Muniandy Maistry was the owner of a grant known as the Tankkyan grant. He died on 3rd October, 1890, leaving as his next heir his mother Sigappa, to whom letters of administration to his estate were granted by the Court of the Recorder of Rangoon. She died on 1st December, 1893, and on her death, the next heirs to the estate of Muniandy Maistry were his cousins, Chellum Servai and Muniandy Servai, who were brothers and members of a joint undivided family; and letters of administration of the estate of Muniandy Maistry were granted to Chellum Servai. Muniandy Maistry had during 1888 and 1889 borrowed several sums of money from one Stumpp, and had deposited with him the title deeds of the Tankkyan grant as security for the repayment of the debt.

On 28th November, 1891 Stumpp assigned this debt to one Arunachellam Chetty, who, on 18th September, 1895, instituted, in the Court of the District Judge of Hanthawaddy, a suit to recover the amount due (Rs. 14,568-12) by sale of the grant. Chellum Servai had, in the meantime, on 11th June, 1895, executed a deed purporting to be a sale of the grant to one T. P. Petherpermal Chetty (the uncle of the appellant) for a consideration stated to be Rs. 30,000 for the grant and four years' arrears of rent due from the tenants. In answer to Arunachellam Chetty's suit, it was pleaded that the sale to Petherpermal Chetty, who had no notice of the equitable mortgage, gave him a title free of the incumbrance.

On 3rd January 1896 the District Judge gave Arunachellam Chetty a decree for sale on the ground that on the evidence in the suit Petherpermal Chetty, at the time of the execution of the deed of 11th June, 1895, had full notice of the equitable mortgage: and that decree was affirmed on appeal by the Commissioner of

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CHANDRA NATH DAS v. KALI-PRASANNA CHAKRAVARTI.

The result, therefore is, that this appeal is decreed, the order of the District Judge, dated the 18th August 1906, as well as the order refusing to grant the application for revival of the appeal, are set aside. We direct that the appeal be sent back to the District Judge of Dacca to be restored to his file under its original number and to be tried according to law.

We make no order as to costs.

Case remanded.

S. M.

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PETHERPERMAL CHETTY v. MUNIANDY SERVAI.

R. M. A. R. L. Muthia Chetty and P. R. M. P. Chinnia Chetty, to recover possession of a certain tract of paddy land about 2,500 acres in extent, known as Government Waste Land No. 1, situate in Tamanaing Circle, Kungyangon Township, Hanthawaddy district, Lower Burma. One Arunachellam Chetty claimed to be an incumbrancer on these lands as equitable mortgagee by deposit of the title deeds for a sum of Rs. 14,568-12.

On the 11th June, 1895, Chellum Servai executed a deed purporting to be a conveyance on sale of the above-mentioned lands to Petherpermal Chetty the elder, a money-lender residing in Rangoon, in consideration of the sum of Rs. 30,000, the receipt whereof was thereby acknowledged.

On the 18th September, 1895, Arunachellam Chetty, the equitable mortgagee, instituted a suit in the District Court of Hanthawaddy against Chellum Servai, as administrator of the estate of Muniandy Maistry, deceased, and Petherpermal the elder, in which he alleged that at the time of the execution of the above-mentioned conveyance Petherpermal the elder was aware of the existence of his (Arunachellam's) claim as equitable mortgagee, and that the sum of Rs. 30,000, the consideration mentioned in the deed, had never been paid, and claimed that he might be declared entitled to hold his equitable mortgage over these lands in priority to the last-mentioned conveyance, and that the defendant Chellum Servai might be ordered to pay to him the sum of Rs. 14,568-12 with interest, and other relief.

Petherpermal the elder filed his defence, and the case having come on for hearing, the District Judge decided, amongst other things, that Petherpermal the elder was, at the date of the deed of conveyance to him, well aware of the existence of this equitable mortgage, and declared that the latter was entitled to priority over the former, and ordered the defendant Chellum Servai to pay to the plaintiff the amount of the latter's claim. Thereupon Petherpermal the elder procured a loan from the two formal defendants to the present suit sufficient to enable him to discharge the amount due to Arunachellum Chetty for debt and costs, and as security for this loan, he executed a mortgage of the

On appeal by the defendant Nos. 2 to 8, the District Judge of Mozufferpur, holding that the decree against the brother's representatives was wrong, set aside the judgment and decree of the 1st Court and ordered that they do get their costs in both Courts. There was a cross objection by the plaintiffs asking that the order dismissing the claim as against the lady might be reversed and a decree made against her. The District Judge, being of opinion that he could not entertain a prayer of that nature made by way of cross-objection and that the right of a respondent to urge cross-objections was limited to his urging them against the appellants only, dismissed the application of the plaintiff.

The plaintiffs appealed to the High Court and the only point raised was, whether the District Judge, when he set aside the judgment and decree of the Court of first instance and held that the plaintiffs were not entitled to recover the mortgage-debt against defendants Nos. 2 to 8 on their appeal, erred in law in refusing to grant the plaintiffs a decree for the recovery of the mortgage-debt against defendant No. 1.

Babu Baldeo Narain Singh, for the appellants.

Moulavi Mahomed Taher, for the defendants Nos. 2 to 8, respondents.

Babu Dwarka Nath Mitter, for the defendant No. 1 respondent.

BRETT AND COXE JJ. The only point raised in this appeal is, whether the District Judge, when he set aside the judgment and decree of the Court of first instance and held that the plaintiffs were not entitled to recover the mortgage debt against defendants Nos. 2 to 8 on their appeal, erred in law in refusing to grant the plaintiffs a decree for the recovery of the mortgage debt against defendant No. 1.

In our opinion the grounds, which the District Judge has given, for refusing to grant the plaintiffs a mortgage decree against defendant No. 1, are not sufficient in law. The cases of *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee*(1), *Hudson* v. *Basdeo Bajpye*(2), and the Full Bench decision in the case of

(1) (1898) I. L. R. 25 Calc. 565. (2) (1898) I. L. R. 26 Calc. 109.

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(2) Is his right of action barred by the 91st Article of Schedule II, to the Indian Limitation Act?

Their Lordships are of opinion that their answer to the first question must be in the affirmative.

A *benami* conveyance is not intended to be an operative instrument.

In Mayne's Hindu Law (7th Ed., p. 595, para. 446) the result of the authorities on the subject of *benami* transactions is correctly stated thus:—

"446. . . . . . Where a transaction is once made out to be a mere *benami* it is evident that the *benamidar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a Court should assist or permit B to cheat A. But, if A requires the help of the Court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether A has actually cheated X or not. If he has done so by means of his *alias*, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality, which he has once cast off in order to defraud others. If, however, he has not defrauded any one, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance, persons have been allowed to recover property, which they had assigned away. . . . . where they had intended to defraud creditors, who, in fact, were never injured . . . But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies: *In pari delicto potior est conditio possidentis.* The Court will help neither party. 'Let the estate lie where it falls'."

Notwithstanding this, it is contended on behalf of the appellant that so much confusion would be imported into the law, if the maxim *in pari delicto potior est conditio possidentis* were not rigorously applied to this case, and, apparently, that the cause of commercial morality would be so much prejudiced, if debtors, who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of the public good, as it were, he ought to be permitted to keep for himself the property, into the possession of which he was so unrighteously and unwisely put.

The answer to that is that the plaintiff, in suing to recover possession of his property, is not carrying out the illegal

On appeal by the defendant Nos. 2 to 8, the District Judge of Mozufferpur, holding that the decree against the brother's representatives was wrong, set aside the judgment and decree of the 1st Court and ordered that they do get their costs in both Courts. There was a cross objection by the plaintiffs asking that the order dismissing the claim as against the lady might be reversed and a decree made against her. The District Judge, being of opinion that he could not entertain a prayer of that nature made by way of cross-objection and that the right of a respondent to urge cross-objections was limited to his urging them against the appellants only, dismissed the application of the plaintiff.

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(1) (1898) I. L. R. 25 Calc. 565. (2) (1898) I. L. R. 26 Calc. 109.

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June, 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside a as preliminary to his obtaining the relief he claims. The 144th, and not the 91st, Article in the second Schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time. Their Lordships are, for these reasons, of opinion that the decision appealed from is right and should be affirmed, and that this appeal should be dismissed. They will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: *H. Arnould & Son.*

Solicitors for the respondent, Muniandy Servai: *Sanderson, Adkin, Lee & Eddis.*

J. V. W.

CIVIL REFERENCE.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Coxe.

VENKATA SA BAROD
v.
MAKSUDAN DAS.*

1908
Feb. 14.

Practice—Civil Procedure Code (Act XIV of 1882), ss. 20, 24—Two suits in two Courts under different High Courts—High Court—Jurisdiction—Stay of proceedings.

Where two suits between the same parties are pending in two Courts under two different High Courts.

Held, that the High Court under the conjoint operation of ss. 20 and 24 of the Code of Civil Procedure can direct proceedings to be stayed in one Court pending trial in the other Court.

Civil Reference by the District Judge of Murshidabad. On the 9th April 1907, Maksudan Das and another, the defendants in the suit, in respect of which this reference was made, brought a suit against Venkata Sa Barod, the plaintiff in the present suit, in the Court of the Subordinate Judge at Benares for accounts.

On the 3rd June of the same year, Venkata Sa Barod brought a suit against Maksudan Das and another in the Court of the 1st Munsif at Jangipur (in the district of Murshidabad under the jurisdiction of the Calcutta High Court) for a portion of the claim included in the suit pending before the Subordinate Judge at Benares.

Upon this, the defendants in the present suit applied in the Court of the 1st Munsif of Jangipur, with notice to the other side, for a reference to this High Court for the disposal of their prayer for stay of proceedings in the Jangipur Court, on the ground that they did not reside or personally work for gain or carry on any business within the jurisdiction of the Court at Jangipur.

* Civil Reference, No. 9 of 1907, by C. W. E. Pittar, District Judge of Murshidabad, dated 14th January, 1908.

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HARIHAR PERSHAD SINGH v. MATHURA LAL.

preferred to the District Judge of Shahabad, but no appeal lay to him and he referred the matter to the High Court in its administrative capacity for directions in the following terms:—

"The appellant is the managing member of a joint Hindu family, under the Mitakshara law. As such he obtained a rent decree, and the amount due under the decree was deposited in Court by the judgment-debtor and the appellant applied to withdraw the money. The appellant has a minor brother, joint with himself. The Court held that under section 461 of the Civil Procedure Code the appellant must give security for the minor's share of the money. The appellant contends that this view is wrong.

The question has arisen between the Court and the appellant. I do not think any appeal lies, neither does section 617 of the Civil Procedure Code apply, as I am not now hearing a suit or appeal nor is the executive proceeding judicially before me.

But the question raised is of very great practical importance, and is a question as to the proper way of conducting office business, rather than one, in which a judicial decision between parties is involved. The Court has money in deposit due to a joint Hindoo family, and the question is, whether it should take security, before making over the money, if there are minors in the family. In my opinion it is clear that the money should be made over to the managing member of the family, without security being taken. The money belongs to the family, as a corporation. No part of it belongs specially to a particular member, whether a minor or not. Technically, therefore, section 461 does not apply. At the same time, as a practical matter, its application is open to most serious objections. In the great majority of Hindu joint families there are some minors, often many, and the utmost inconvenience would be caused if, whenever there were any minors in the family, the *Karta* were obliged to give security before being allowed to withdraw from Court the decretal amounts of rent decrees, etc.

Legal and practical considerations require that the *Karta* should not be required to give security. The matter is practically one for the conduct of Government office business.

In my opinion there should be an authoritative decision, such as the orders in the High Court rules, that section 461 does not require a Court to take security from the managing member of a joint Hindu family, though the member of the family be not all majors."

The High Court declined to determine in its administrative capacity the correctness or otherwise of a judicial order, and suggested that the party aggrieved by the order of the Munsif should be informed that he, if so advised, should move the High Court under s. 622 of the Civil Procedure Code or such other law as might be applicable.

The plaintiff thereupon moved the High Court and obtained this Rule.

CIVIL RULE.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Coxe.

ASIRUDDI MANDAL

v.

MOKHADA MOYEE DASI.*

1908
Jan. 7.

Bengal Tenancy Act (XIII of 1885), ss. 143, 170—Bengal Tenancy Amendment Act (Bengal Act I of 1907), s. 54—Civil Procedure Code (Act XIV of 1882), s. 310A.

Even before the passing of the Bengal Tenancy Amendment Act of 1907, s. 310A of the Code of Civil Procedure did not apply to a tenure or holding attached in execution of a decree for arrears due thereon.

IN execution of a decree for rent against the tenant, a tenancy was sold on the 7th May 1907 and purchased by Asiruddi Mandal, the petitioner. On the 23rd May 1907, the opposite party, Mokshadamayee Dasee, alleging herself to be an under-raiyat in the tenancy sold, applied under s. 310A of the Civil Procedure Code to have the sale set aside after depositing the amount.

The Munsif of Basirhat, to whom this application under s. 310A was made, on the 16th July 1907 held that the opposite party had a *locus standi* to apply under s. 310A and set aside the sale, notwithstanding an objection by the petitioner.

Babu Atul Krishna Ray, for the petitioner, contended that as the amending Act, Bengal Act I of 1907, came into force on the 22nd May, the day that it was gazetted, an application by the opposite party under s. 310A of the Civil Procedure Code did not at all lie.

Babu Baikunthanath Das, for the opposite party. As the proceedings in this case commenced before the amending Act came into force, by s. 8(c) of Bengal General Clauses Act

* Civil Rule No. 2705 of 1907, against the order of the Munsif of Basirhat, dated July 16, 1907.

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accredited agent of the family, to do all acts beneficial to and necessary for the family, including the withdrawal of money deposited in Court to its credit. The introduction of the infant member of the family, under the representation of the managing member as a next friend, was merely formal, a matter of procedure and was not necessary so far as substantive rights were concerned.

The legal constitution under Hindu Law of a joint family governed by the Mitakshara system is such that a co-parcener has no defined share in the family property; the co-parceners are in the nature of a body corporate with joint rights, followed on the death of a member by survivorship. The interest of a co-parcener is not capable of definition, it being under constant liability to variation on the birth of a new member or the death of an existing member. In the case of the birth of a male member, he acquires an interest at once by birth, and supposing money were deposited in Court to the credit of the family represented at the date of the decree in a suit by the then living members, the new member would at once acquire an interest in it, thus decreasing the definable shares of the other co-parceners. On the other hand, the death of a co-parcener increases the definable shares. Such variations, however, are not due to legal representation in the sense that these words are ordinarily used, but owing to the rule of survivorship.

The fact that a minor member has no defined share, that it cannot be said at any time before partition what is the precise interest of a minor plaintiff in money deposited in Court, when he has sued with the adult managing member, takes the case out of the purview of section 461. That section was not framed with an eye to the peculiar constitution of joint Hindu families. The minor plaintiff's share in the amount deposited in Court being undetermined, the bond would have to be, if any were, executed, for an indefinite amount; but such a contingency, as also, the execution of the bond itself for the benefit of a co-parcener, are opposed to the spirit and language of section 461. It would appear that in framing section 461, attention was not given to the peculiar constitution of joint Hindu families governed by the Mitakshara school.

runs as follows: "Where this Act, or any Bengal Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed." It appears that the execution proceeding and the sale in this particular case had taken place before the amended Bengal Tenancy Act came into operation on the 22nd of May 1907, and the argument is that section 54 of the amending Act repealed some portion of the Bengal Tenancy Act and that the opposite party had acquired a right, under section 310A, to come in and make the deposit, and that the repeal could not affect that right. That is in substance the argument submitted to us.

We must first consider, whether there has been any repeal of the Bengal Tenancy Act upon this point. In no part of the Bengal Tenancy Act (Act VIII of 1885) is section 310A of the Code of Civil Procedure referred to, and for the best of all reasons that it was not then in existence, inasmuch as section 310A was not added to the Code of Civil Procedure, until the 2nd of May 1894, that is nearly nine years after the Bengal Tenancy Act had been in operation. The argument of the opposite party is that section 170 does by implication, coupled with section 143 of the Bengal Tenancy Act, incorporate, if I may use the expression, all the sections of the Code of Civil Procedure relating to suits, except those, which are expressly excepted. Section 170 runs thus: "Sections 278 to 283 (both inclusive) of the Code of Civil Procedure shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon." And section 143, subsection (2) runs as follows: "Subject to any rules so made, and subject also to the other provisions of this Act, the Code of Civil Procedure shall apply to all such suits." But those provisions can only apply to the Code of Civil Procedure, as it then stood, and it could never have been intended that all the provisions of any subsequent amendment of the Code were to apply. In this view, there was no repeal of any portion of the Bengal Tenancy Act, and consequently section 8 of the Bengal General Clauses Act has

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disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application."

The object of the section is to protect property received by guardians *ad litem* on behalf of the minors they represent. There is nothing in the words of the section from which any exception may be deduced. The language used is general and applicable to every case where property is received by a mere guardian *ad litem* on behalf of a minor. To read an exemption into the section must, therefore, be justified only by the clearest necessity.

Now, the facts, upon which this Rule has to be decided, are such as are contemplated by the section. The adult plaintiff, who was the manager of the joint family, was never appointed or declared to be the guardian of his minor brother's property under the Guardians and Wards Act, VIII of 1890. But he could not be so appointed, because, as is now settled law, the interest of the minor co-plaintiff is not *individual* property at all. It may be said that, if the adult plaintiff represented the joint family, the addition of his minor brother, as a co-plaintiff, was either unnecessary or intended to imply that the minor had some separate interest in the arrears of rent to recover which was the object of the suit. It is, however, too late to contend that, according to strict principles of Hindu Law, the managing member of a Mitakshara family can sue without joining the other members as parties to the suit: see *Kathusheri Pishareth* v. *Vallotil Manakel Narayanan*(1). There may be cases in which a manager alone can sue to recover rent; for example, if he has given a lease in his own name, and the suit is for rent due in terms of the lease. This is not the case here, nor is there anything to indicate that the minor co-plaintiff is possessed of any separate property, which might be the subject of proceedings under Act VIII of 1890.

On principle, also, joint brothers cannot be sureties, one of another, in a Mitakshara family; therefore, the adult plaintiff

(1) (1881) I. L. R. 3 Mad. 234.

CIVIL RULE.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Coxe.

SHILABATI DEBI
v.
RODERIGUES.*

1908
Jan. 3.

Bengal Tenancy Act (VIII of 1885), s 153—Landlord and tenant—Munsif with special power, decision of—Appeal—Suit—Value of Suit.

When a Munsif has once been specially empowered to exercise final jurisdiction under s. 153 (b) of the Bengal Tenancy Act:—

Held, first, that it is not necessary that the power should be conferred again on him on his transfer to another district; *second,* that no appeal lies from a decision of the Munsif, where the only question decided was, whether the relationship of landlord and tenant existed or not and the value of the suit did not exceed fifty rupees.

Held further that, where the original claim was more than fifty rupees, but it was reduced to below fifty on the case coming on for trial, the claim must be regarded as one for less than fifty rupees.

RULE granted to Srimati Shilabati Debi, defendant petitioners.

On the 17th April, 1906 the plaintiff, M. V. Roderigues, instituted a suit against the petitioner, Srimati Shilabati Debi, in the Court of the 1st Munsif at Hooghly, for the recovery of Rs. 117-6 for arrears of rent and damages and for increased rent for alteration of area. The petitioner denied the relationship of landlord and tenant. On the 17th December, 1906 the plaintiff withdrew his claim for increased rent and reduced his claim to Rs. 7-8 only. The Munsif dismissed the suit, holding that the relationship of landlord and tenant was not proved. The plaintiff thereupon appealed to the District Judge of Hooghly, who decreed the plaintiff's suit, holding that the question in the appeal involved a right to receive rent and that therefore an appeal lay to him.

The petitioner applied to the High Court under s. 622 of the Civil Procedure Code.

* Civil Rule No. 2353 of 1907.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

1908
Feb. 19.

KESHOBATI KUMARI

v.

MACGREGOR.*

Receiver—Receiver's accounts—Directions as to, if appealable—Civil Procedure Code, ss. 503, cl. (f), and 588, cl. 24.

Directions given by a Court in passing receiver's accounts are not appealable.

APPEAL by the petitioner.

W. O. Macgregor, the defendant-respondent, was appointed by the Court the receiver of the Hundwa Estate, and acted as such from the 22nd December 1905 to the 4th July 1906, on which date he was dismissed by the Court. But W. O. Macgregor continued to act as the receiver up to the 24th October, the date on which he actually made over charge to the agents of Rani Keshobati, the petitioner.

On the 31st October, 1906, Rani Keshobati Koer filed a petition in the Court of the District Judge, Santal Parganas, charging Mr. Macgregor with mismanagement of the Hundwa Estate in his capacity as *ad interim* receiver.

The Deputy Commissioner of Dumka by his order (dated the 26th February, 1907) on the petition passed the accounts and gave certain directions as to further examination of certain items of the account.

The petitioner, being dissatisfied with this order directing further examination, has appealed.

Babu Joygopal Ghosha for the respondent took a preliminary objection to the hearing of the appeal, contending that no appeal lay under ss. 503 and 588 of the Civil Procedure Code.

* Appeal from Order, No. 95 of 1907, against the order of H. W. Scroope, District Judge of Santal Parganas, dated the 26th of February, 1907.

relationship of landlord and tenant did not exist and dismissed the suit. Then there was an appeal to the District Judge: and the District Judge took the view, notwithstanding the objection of the defendant, that he could entertain the appeal, on the ground that the question in appeal involved a right to receive rent. The question really was whether the relationship of landlord and tenant existed, but the District Judge dealt with the case, as I have said, upon another footing, which I think is not well founded.

It is now urged before us that the District Judge had no jurisdiction to deal with the matter, having regard to the language of section 153 of the Bengal Tenancy Act. I think it is quite clear that the decree passed by the Munsif in this case did not "decide any question relating to title to land or to some interest in land as between parties having conflicting claims thereto, or a question of a right to enhance or vary the rent of a tenant, or a question of the amount of rent annually payable by a tenant." It only decided the question of whether or not the relationship of landlord and tenant existed. *Primâ facie* no appeal would lie. No attempt has been made by the opposite party on this application to support the view of the District Judge, on the grounds stated by him. But two points have been taken: *First*, it is urged that the amount claimed in the suit exceeded Rs. 50. I have stated the facts. No doubt, the original claim was more than fifty rupees, but, when the suit came on for trial, the claim was reduced to Rs. 7-8. I think the consequence would be a little dangerous, if we were to accept the plaintiff's argument and say in the circumstances such as these that the claim exceeded fifty rupees.

Then, another point was taken, namely, whether the Munsif, who was a Munsif of Hooghly, when he tried this suit, was specially empowered by the Local Government to exercise final jurisdiction under section 153 of the Bengal Tenancy Act. What happened is this. On the 31st of July, 1896, this gentleman, who was then a Munsif of Baruipur, was specially empowered to exercise a final jurisdiction under section 153 (*b*) of the Bengal Tenancy Act; but, after that power had been conferred upon him, he was transferred to Hooghly. It is contended that he could

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Court directs. No doubt, in passing the receiver's accounts, the Court may have to give certain directions; but it does not appear to us that these directions are subject to an appeal to this Court under section 588, clause (24) of the Civil Procedure Code.

We therefore dismiss this appeal with costs.

Appeal dismissed.

S. M.

PRIVY COUNCIL.

PETHERPERMAL CHETTY
v.
MUNIANDY SERVAI.*

P.C.
1908
Feb. 6.
March 18.

[On appeal from the Chief Court of Lower Burma, Rangoon.]

Benamidar—Benami transaction—Fraud—Deed—Creditor—Equitable mortgage—Suit—Limitation Act (XV of 1877), Sch. II, Articles 91, 144—Deed declared inoperative and fraudulent.

In order to defeat the claim of an equitable mortgagee of certain property, the predecessor in title of the respondent, and co-member with him of a joint Hindu family, executed on 11th June, 1895, what purported to be a deed of sale of the property in favour of the predecessor in title of the appellant.

The claim, however, was decreed, the Court finding that the vendee under the alleged deed of sale was aware of the equitable mortgage, when the deed was executed; and the decree was satisfied by money raised on the security of the property by the vendee.

In a suit by the respondent against the appellant to have it declared that the deed of 11th June, 1895 was merely a *benami* transaction, and to recover possession of the property, it was found on the facts that the deed was *benami* and fraudulent and inoperative as against the plaintiff.

Held, that the purpose of the fraud not having been effected, there was nothing to prevent the plaintiff from repudiating the transaction as being *benami*, and recovering possession of the property.

Taylor v. *Bowers*(1), *Symes* v. *Hughes*(2), and *In re Great Berlin Steamboat Co* (3), followed.

Kearley v. *Thomson*(4), distinguished.

Held, also, that the deed being inoperative, it was unnecessary for the plaintiff to have it set aside as a preliminary to his obtaining possession of the property. The suit was therefore governed, not by article 91, but by article 144 of Schedule II of the Limitation Act (XV of 1877) and consequently was not barred by lapse of time.

APPEAL from a judgment and decree (February 2nd, 1905) of the Chief Court of Lower Burma, which affirmed a decree

* *Present:* Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson.

(1) (1876) L. R. 1 Q. B. D. 291.
(2) (1870) L. R. 9 Eq. 475, 479.
(3) (1884) L. R. 26 Ch. D. 616.
(4) (1890) L. R. 24 Q. B. D. 742.

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After the Munsif had partially gone into the case, the petitioner on the 5th of August, 1907 applied to the District Judge for setting aside his previous order.

On the 1st of October 1907 the Munsif pronounced judgment in favour of the opposite party and against the petitioner and a certificate under section 63 of the Act was forwarded by the Court to the Collector, who on the 18th of December 1907 directed the names of the opposite party to be registered as the proprietors in possession. In the meantime on the 9th of December 1907 a rule was obtained from the High Court on the opposite party to show cause, why the order of the Munsif should not be set aside on the ground that he had no jurisdiction to try the case; it was also argued that the High Court had no jurisdiction under section 622 of the Civil Procedure Code to revise the order of the Civil Court.

Dr. Rash Behari Ghose and *Babu Chunder Sekhar Prosad Singh* for the petitioner.

Babu Umakali Mookerjee and *Babu Lachmi Narain Singh* for the opposite party.

MITRA AND CASPERSZ JJ. In a matter arising out of a proceeding under the Bengal Registration Act, VII of 1876, a reference was made by the Collector under section 55 of the Act to the principal Civil Court in the District of Gya. The value of the property appears to have been over Rs. 2,000. The District Judge, on receipt of the reference, directed the Munsif to determine the question of possession or title to possession for the purpose of finding out whose name should be registered in the register of the Collectorate. An objection was made to the jurisdiction of the Munsif to try the case. The objection was, however, disallowed by the District Judge, and the Munsif pronounced his judgment in favour of the opposite party and against the petitioner before us. This order was made on the 1st October, 1907. Thereafter, and before any application was made to this Court, a certificate under section 63 of the Act was forwarded by the Civil Court to the Collector, and it appear

Pegu on 28th March, 1896, and by the Judicial Commissioner of Lower Burma on 23rd November, 1896, both the Appellate Courts in their judgments expressing doubts as to the *bonâ fides* of the deed of sale.

Chellum Servai died on 15th June, 1896, and on his death Muniandy Servai (the plaintiff in the suit, out of which the present appeal arose) became entitled to the estate. He was at that time in Madras and did not return to Burma, until about six months later. Petherpermal Chetty then asserted an absolute title in himself to the Tankkyan grant. On 4th June, 1897 Muniandy Servai applied for letters of administration to such portion of the estate of Muniandy Maistry as was unadministered. In his application he challenged the title of Petherpermal Chetty, who opposed the application; and by order dated 15th July, 1897, Muniandy Servai was referred to the Civil Court to establish his title. After giving instructions for the institution of a civil suit, he was induced to refer the dispute to the arbitration of a *punchayet* of certain elders of his class, who decided in favour of Muniandy Servai; and Petherpermal Chetty agreed to restore possession of the grant and render accounts. Muniandy Servai wished to return at once to Madras, so Rs. 1,000 was paid to him on account, and the actual delivery of possession and settlement of accounts was postponed, until he returned. He left Rangoon on 30th July, 1897, and early in the morning of that day executed a document at the house of one Maung Shwe Waing. This document purported to be a release of all claims, but at the time of the execution was fraudulently represented by Petherpermal Chetty to be a record of the arrangement for restoring the property and rendering accounts.

Muniandy Servai returned to Burma about a year afterwards, when Petherpermal Chetty declined to give up possession, and set up the document of 30th July, 1897 as a release..

Muniandy Servai thereupon, on 24th July, 1901, brought the present suit, claiming possession of the Tankkyan grant, and alleging that the deed of sale of 11th June, 1895 was a *benami* transaction and not intended to be operative; and that the deed of release dated 30th July, 1897 had been fraudulently obtained from him. The defendants were Petherpermal Chetty and two

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On the third ground argued before us, we think that the rule must be discharged. That ground is that the Civil Court, which entertained the reference under section 55 of the Act, has ceased to have any jurisdiction in the matter, and we cannot, therefore, exercise our revisional jurisdiction. As soon as the certificate was sent to the Collector and the Collector registered the names of the persons, who were successful in the Civil Court, the function of the Civil Court ceased. We could not direct the Collector to alter the entry in the register. So far as the function of the Civil Court was concerned, it terminated with the registration of the names by the Collector. We ought not, therefore, to interfere in the matter.

There is another reason also why we ought not to interfere in this case. The petitioner has his remedy in the Civil Court. If the Munsif has acted without jurisdiction the order may be set aside or the entry about registration may be altered by an adjudication of title by the Civil Court.

The rule is accordingly discharged with costs.

S. C. B.

lands now sought to be recovered. No question has been raised as to the validity of this latter incumbrance.

It is therefore clear that, whatever may have been the design to effect which the deed of the 11th June, 1895 was executed, Arunachellam Chetty, the creditor, was not by it in fact defrauded of his debt. He was paid his debt together with the costs of the litigation, which he successfully prosecuted, and, if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take.

On the 30th July, 1897, R. Muniandy Servai and Pether-permal, the elder, executed a deed of release, by which the former released all his interest in the lands sued for in consideration of Rs. 1,000 paid to him by the latter. The District Judge found that the execution of this deed was procured by a misrepresentation, and declared that its only effect at law was as a receipt for the sum of Rs. 1,000. No objection was taken in the argument on the appeal in reference to the finding on this point.

It was proved by the affirmation of Muniandy Servai given in evidence in this case that the deed of the 11th June, 1895 was executed in order to enable the rent to be collected and paid to the grantors, and "to quash Subramanian's case," *i.e.*, the case of the equitable mortgagee. The District Judge held that it was "a *benami* conveyance" made by the parties to it "in collusion to defeat" the claim of the equitable mortgagee on the lands. The Chief Court of Burma on appeal upheld that decision.

It was not pressed in argument by Counsel on behalf of the appellant that, on an issue of fact such as this, the finding of the Judge, who tried the case and saw the witnesses, approved, as it was, upon appeal, should, under the circumstances of the case be disturbed.

The only questions, therefore, for their Lordships' decision are :—

(1) Is the plaintiff, despite his participation in this fraudulent attempt to defeat his creditor, entitled to recover the possession of the lands purported to be conveyed?

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Ladun v. *Bhyro Ram* (1) referred to.

There is no fixed time within which the *talab-i-ishtishad* should be performed and it is a question of fact for the Court to determine, whether it was done within due time.

Jumeelun v. *Luteef Hossein*(2) followed.

The performance of the *talab-i-ishtishad* is not meant to be done for the information of the vendor or vendee, though no doubt its effect may be to give them information. The formality is insisted on with the object of securing evidence that the pre-emptor has really asserted his right and because evidence is wanted in order to establish proof before the Magistrate, and, unlike the *talab-i-mowasibat*, it must be performed in the presence of witnesses.

Rujjub Ali Chopedar v. *Chundi Churn Bhadra*(3) referred to.

The performance of the ceremony in the *kachari* of the vendor is a sufficient compliance with the law.

Mubarak Husain v. *Kaniz Bano*(4) not followed.

A guardian or manager under the Court of Wards can perform and it is his duty to perform the ceremonies of pre-emption on behalf of an adult female ward of Court; and from the omission in the Court of Wards Act to confer the right expressly on the guardian or manager, it does not follow that he is not entitled to perform these ceremonies.

Abadi Begam v. *Inam Begam*(5), *Umrao Singh* v. *Dalip Singh*(6) referred to.

Fabrication is not one of the devices permissible under the Mahomedan law for defeating the right of pre-emption.

Per COXE J. An order under s. 29 of the Bengal Estates Partition Act has not the effect of dividing the shares of the proprietors finally, until the date specified in s. 95 of the Act, and, until the later date, the right of pre-emption subsists

Wahed Ali Khan v. *Hunooman Pershad* (7) referred to.

Joobraj Singh v. *Tookun Singh* (8) distinguished.

APPEAL by defendants Nos. 2 and 4 to 11.

This was a suit for enforcing a right of pre-emption. Maharani Janki Koer of Bettia, the plaintiff, was the pre-emptor and defendant No. 1 was the vendor and defendants Nos. 2 to 11 were the purchasers. The property in dispute was the share of the defendant No. 1 in *mehal* Motihari. The plaintiff was admittedly a co-sharer of the *mehal*. The defendants Nos. 2 to 11, the purchasers, had no share in the *mehal* before the date of their purchase of the disputed share. The plaintiff's case was that the sale was effected, without giving her notice, for a

(1) (1867) 8 W. R. 255.
(2) (1871) 16 W. R. F.B. 13.
(3) (1890) I. L. R. 17 Calc. 543.
(4) (1904) I. L. R. 27 All. 160.
(5) (1877) I. L. R. 1 All. 521.
(6) (1901) I. L. R. 23 All. 129.
(7) (1869) 12 W. R. 431.
(8) (1870) 14 W. R. 476.

transaction, but is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant, who is relying upon the fraud, and is seeking to make a title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Tayor* v. *Bowlers*(1), and the authorities upon which that decision is based, clearly establish this. *Symes* v. *Hughes*(2) and *In Great Berlin Steamboat Co.*(3) are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry, L.J., in *Kearley* v. *Thomson*(4).

Mr. Upjohn contended that, where there is a fraudulent arrangement to defeat creditors, such as was entered into in this case, if anything be done or any step be taken to carry out the arrangement, such as on the trial of an indictment for conspiracy, would amount to a good overt act of the conspiracy, any property transferred by the debtor to his co-conspirator cannot be recovered back. This, however, is obviously not the law. In conspiracy the concert or agreement of the two minds is the offence, the overt act is but the outward and visible evidence of it. Very often the overt act is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless; but to enable a fraudulent confederate to retain property transferred to him, in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.

As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th

(1) (1876) L. R. 1, Q. B. D. 291.
(2) (1870) L. R. 9 Eq. 475, 479.
(3) (1884) L. R. 26 Ch. D. 616.
(4) (1890) L. R. 24 Q. B. D. 742.

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the plaintiff alleged she came to know of the sale, (5) that the plaintiff's manager was aware of the fact that the property in dispute was in the market long before the defendants made the purchase, (6) that, as he had refused to pay the full and adequate consideration-money, the property was sold to themselves, (7) that the share of *tola* Begumpur, which the plaintiff claimed to have purchased in February 1905, was covered by their *kabala* of the 24th July 1904, (8) that on account of her subsequent purchase of the share of that *tola* she had lost her right of pre-emption, and (9) that the consideration-money mentioned in their sale deed was the actual price paid by them for the disputed property.

Defendant No. 1 practically supported the plaintiff's case by her written statement.

The Subordinate Judge decreed the suit in full against defendants Nos. 2 to 11.

The Advocate-General (*Hon. Mr. P. O'Kinealy*), (*Babus Umakali Mukherji*, *Babu Manomohan Datta* and *Maulvi Syed Muhammad Tahir* with him), for the appellants. The law of pre-emption not being the territorial law, the fact that the custom prevails among Hindus of Bihar must be pleaded and proved: *Fukeer Rawot* v. *Sheikh Emambuksh* (1), *Hubeebul Hossein* v. *Lalla Dewkee Nundun* (2), *Inder Narain Chowdhry* v. *Mahomed Naziroodddeen* (3), *Moheshee Lal* v. *Christian* (4), *Sheraj Ali Chowdhry* v. *Rumzan Bibee* (5), *Mohesh Lall* v. *Christian* (6), *Kantee Ram* v. *Wulee Sahoo* (7), *Hira* v. *Kallu* (8).

Where there is no such established custom or it is difficult to ascertain what law would apply, Courts are to be guided by principles of equity, justice and good conscience: See, Civil Courts Act (XII of 1887), s. 37; *Gopal Sahi* v. *Ojoodheapershad*(9), *Joobraj Singh* v. *Tookun Singh*(10), *Braja Kishor Surma* v. *Kirti Chandra Surma*(11). In the present case the plaintiff refused to exercise the rights of pre-emption, until after the sale

(1) (1863) W. R. F. B Vol. 143.
(2) (1864) W. R. Gap. Vol. 74.
(3) (1864) 1 W. R. 234.
(4) (1866) 6 W. R. 250.
(5) (1867) 8 W. R. 204.
(6) (1867) 8 W. R. 446.
(7) (1869) 11 W. R. 251.
(8) (1883) I. L. R. 7 All. 916.
(9) (1865) 2 W. R. 47.
(10) (1870) 14 W. R. 476.
(11) (1871) 7 B. L. R. 19, 25.

CIVIL RULE.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

1908
March 27.

HARIHAR PERSHAD SINGH
v.
MATHURA LAL.*

Civil Procedure Code (Act XIV of 1882) s. 461—Joint Mitakshara family—Minor—Next friend—Minor's money in Court—Managing member of Mitakshara family—Withdrawal of money from Court.

The managing member of a joint Hindu family governed by the Mitakshara school, who is also appointed guardian *ad litem* of his minor brother for the purpose of a rent suit, in which both the brothers obtained a decree for arrears of rent against their tenant, *is exempt from the restrictions imposed by s. 461 of the* Civil Procedure Code.

Sham Kuar v. Mohanunda Sahoy(1), *Appovier v. Rama Subba Aiyan*(2), *Garib-ulla v. Khalak Singh*(3) and *Kathusheri Pishareth v. Vallotil Manakel Narayanan*(4), referred to.

RULE granted to the plaintiffs, Harihar Pershad Singh and another.

Harihar Pershad Singh, who with his minor brother, Bhaskar Persad Singh, formed a joint family governed by the Mitakshara system of Hindu Law, instituted a suit for rent in the Court of the Munsif at Arrah; Bhaskar Pershad was represented in this suit by his said brother, as next friend.

A decree for rent was made and the tenant-defendant deposited the decretal amount in Court. An application for the withdrawal of the money was made, which was refused by the Munsif, on the ground that no order for payment could be made, until the next friend of the minor had complied with the provisions of s. 461 of the Civil Procedure Code. An appeal was

* Civil Rule No. 2 of 1908.

(1) (1891) I. L. R. 19 Calc. 301.
(2) (1866) 11 Moo. I. A. 75.
(3) (1903) I. L. R. 25 All. 407; L. R. 30 I. A. 165.
(4) (1881) I. L. R. 3 Mad. 234.

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p. 287. The plaintiff claimed the right of pre-emption too late. *Lastly*, the Court of Wards through its manager cannot perform the *talab-i-ishtishad*. The Court of Wards Act gives him no such power. See sections 14, 20, 38, 39, 41, 48 (last part of cl. 3), 49 and 50. The manager can do only all acts for the proper care and management of the existing property. See also *Dinesh Chunder Roy* v. *Golam Mostapha*(1), *Bhoopendro Narain Dutt* v. *Baroda Prosad Roy Chowdhury* (2).

The Hon'ble Dr. Rash Behary Ghose (*Maulvi Muhammad Yusuf*, *Babus Ramcharan Mitra* and *Naliniranjan Chatterji* and *Maulvi Syed Shamshul Huda* with him). The Mahomedan law of pre-emption prevails among Hindus of Bihar: *Ramrutun Sing* v. *Chunder Narain Rai*(3), *Meethun Lal* v. *Deo Murat*(4), *Fukeer Rawot* v. *Sheikh Emambuksh*(5), *Joy Koer* v. *Suroop Narain Thakoor*(6), *Sheojuttun Roy* v. *Anwar Ali*(7), *Ram Doolar Misser* v. *Jhumuck Lall Misser*(8), *Parsasth Nath Tewari* v. *Dhanai Ojha*(9). See also Amir Ali's Mahomedan Law, Vol. I, 3rd Ed., p. 596, Wilson's Digest of Mahomedan Law, Art. 351, p. 396. There is no authority for saying that, even in case the custom is a well-established one, the custom must be pleaded and proved. See *Fukeer Rawot* v. *Sheikh Emambuksh*(5) cited by the appellant on this point. The cases cited by the appellants on this point are mostly from districts, where custom is not well established. Champaran is included in *suba* Bihar: Ain-i-Akbari (Gladwin), p. 477, and Hunter's Statistical Account of Bengal, vol. xiii, p. 252. The custom has been judicially recognized in Champaran: Wilson's Digest of Mahomedan Law, p. 396, and Amir Ali's Mahomedan Law, Vol. I, 3rd Ed., p. 596. Claim (pre-emption) cannot be made, when the negotiation is being made and the right does not accrue, till the sale is complete: *Goordyal Mundur* v. *Teknarain Singh*(10), *Ladun* v. *Bhyro Ram*(11), *Janki* v. *Girjadat*(12), *Begam* v. *Muhammad Yakub*(13). The Full Bench case, *Janki* v. *Girjadat*(12)

(1) (1888) I. L. R. 16 Calc. 89.
(2) (1891) I. L. R. 18 Calc. 500, 503.
(3) (1792) 1 Sel. Rep. 1.
(4) (1837) 6 Sel. Rep. 197.
(5) (1863) W. R. F. B. Vol. 143.
(6) (1864) W. R. Gap Vol. 289.
(7) (1870) 13 W. R. 189.
(8) (1872) 17 W. R. 264.
(9) (1905) 9 C. W. N. 874.
(10) (1865) 2 W. R. 215.
(11) (1867) 8 W. R. 255.
(12) (1885) I. L. R. 7 All. 482.
(13) (1894) I. L. R. 16 All. 344.

Babu Jogendra Nath Ghose, for the petitioners.
No one appeared to show cause.

MITRA J. Harihar Persad Singh and Bhaskar Persad Singh are brothers, members of a joint family governed by the Mitakshara system of Hindu law. Harihar Persad is an adult and is the managing member; Bhaskar Persad is a minor. The brothers instituted a suit for rent against one of their tenants in the Court of the Munsif at Arrah, Bhaskar Persad being represented in the suit by his brother as next friend. They obtained a decree for rent and the tenant defendant deposited the amount of the decree in court to their credit. Thereafter, they applied for the withdrawal of the amount, but the Munsif declined to make an order for payment, on the ground that no order for payment could be made, until the next friend of the minor plaintiff had complied with the provisions of section 461 of the Code of Civil Procedure by obtaining leave of the Court to receive the money and by filing a security-bond for the protection of the minor's interest.

The order of the Munsif was appealed from to the District Judge of Shahabad; but no appeal lay to him and he referred the matter to this Court in its administrative capacity for directions in this case and in similar cases, which are of constant occurrence. The Court, however, declined in its administrative capacity to determine the correctness or otherwise of a judicial order and to give any general directions.

The present application was made under section 622 of the Code for revision of the order of the Munsif and a rule was issued. No cause has been shown.

Harihar Persad is the managing member of the joint family, and he represents it; and though, according to the rules of procedure in this Province, his minor brother is a necessary party in suits for rent, and was properly added as a co-plaintiff in the present suit, his absence from it as a party would not, according to the well established principle of Hindu law regarding joint families, detract from the right of the managing member, the

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Husain(1), *Munna Khan* v. *Chheda Singh*(2). Mere purchase of a share by the pre-emptor is not fatal to a suit for pre-emption. There must be a complete partition, which is not the case here: *Gopal Sahi* v. *Ojoodheaavershad*(3), *Wahed Ali Khan* v. *Hunooman Pershad*(4), *Joobraj Singh* v. *Toohun Singh*(5).

Maulvi Muhammad Yusuf for the respondents. In Mahomedan law generally no question of equitable consideration is relevant. Rules are divine. The key to Mahomedan law is the manifest will of God, viz., the will of God to issue a command and the consequent issue of the command in each particular case. God's will is necessary in every case and that will must be invoked in every case by some one by means of *illut*. The means of invoking must be such as are recognized by the *Shera*. The invocation must be so that it should pass on to the object and must not be prevented from reaching that object and thus becoming premature and abortive. The other element necessary in the law of pre-emption is the discovery of the intention of parties from their *external* acts. If the *shafee*, to whom God has given the optional right to pre-empt, has *rughbat* or inclination as distinguished from *airaz* or disinclination, the right comes into existence. The limit of time for performing *mowasibat* depends upon the nature of the right of *shoofa* and how according to *Shera* a mental feeling is to be presumed. Compares the law with the law of divorce. After *illut*, or compulsory and creative cause of direct command to perform, arises, the mind of the *shafee* must be made up. The period allowed for this is not limited, though it is variously stated to be a day, 3 days, or until the right is expressly given up. The reason given by Maulvi Abdul Ali for *wasub* or immediate demand is: "in order that the right given by God be not lost (*sokit*)." There cannot be *airaz* or relinquishment of right before the actual accrual of it. Before actual sale, the right of *shoofa* does not arise. See Doorool Mukhtar and Ruddool Mukhtar. Before the actual accrual of the right, there is only *sabab* or a material and foreshadowing of cause, or perhaps only a transition stage and a

(1) (1896) I. L. R. 18 All. 300.
(2) (1906) I. L. R. 28 All. 631.
(3) (1865) 2 W. R. 47.
(4) (1869) 12 W. R. 481.
(5) (1870) 14 W. R. 476.

In *Sham Kuar* v. *Mohanunda Sahoy*(1) the Court held that a guardian under Act VIII of 1890 cannot be appointed of the property of a minor, who is a member of a joint Hindu family governed by the Mitakshara law and possessed of no separate estate, the reason of the decision being that the introduction of a guardian of a share, which is unascertained and unspecified, would tend to disorganise the family and bring about a separation without a partition The foundations, on which families governed by the Mitakshara system rest, as laid down in *Apporier* v. *Rama Subba Aiyan*(2), would be competely shaken, if the rules of procedure and practice intended to apply to persons and their rights and liabilities of an altogether different character, were made applicable to the co-parceners of such families. The same principle was applied in *Garib-ullah* v. *Khalak Singh*(3) by the Judicial Committee of the Privy Council to a mortgage executed by the *karta* of a joint family governed by the Mitakshara system of Hindu Law for himself and a minor co-parcener, notwithstanding that a guardian of the minor had been appointed by the Court. The Privy Council ignored the status of the guardian appointed by Court and upheld a mortgage executed without the permission of the Court.

We, therefore, make the Rule absolute and set aside the order of the Munsif and direct him to pass a payment order as asked for by the petitioners.

CASPERSZ J. The question for our decision in this Rule is, whether the managing member of a joint Hindu family, governed by the Mitakshara, who was appointed the guardian *ad litem* of his minor brother for the purpose of a rent suit, in which both the brothers obtained a decree for arrears of rent against their tenant, is exempt from the restrictions imposed by section 461 of the Code of Civil Procedure.

Section 461 (2) of the Code runs thus:—"Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any

(1) (1891) I. L. R. 19 Calc. 301.
(2) (1866) 11 Moo. I. A. 75.
(3) (1903) I. L. R. 25 All. 407; L. R. 30 I. A. 165.

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by the Court of Wards. The plaintiff is a co-sharer in the estate *mehal* Motihari and, though she is a Hindu lady, she asserts that under the local law or custom, which prevails in the district of Champaran, she is entitled to claim the right of pre-emption, which is given to Mahomedans under the Mahomedan law. The vendor of the property in question, namely defendant No. 1, is a Mahomedan lady. The purchasers are Hindus. In the plaint, paragraph 4, it is stated that, though in the deed of conveyance executed by defendant No. 1 to defendants 2 to 11 it is stated that the price of the property sold was Rs. 39,967, this is a false statement and the property was in fact sold for Rs. 26,000 only. In the plaint, paragraph 6, it is further stated that the ceremonies necessary to enable the plaintiff to assert her right of pre-emption were duly and legally performed on her behalf by her manager, that is to say the *talab-i-mowasibat* on the 13th August 1904 at Bettia and the *talab-i-ishtishad* at Motihari on the 15th August 1904. The prayers in the plaint were that the plaintiff's right of pre-emption over the shares in the villages sold by defendant No. 1 to defendants 2 to 11 be declared, that the actual consideration paid for the sale be ascertained, that it be ordered that on payment of the actual consideration by the plaintiff the defendants 2 to 11 do convey the property to the plaintiff, that, if the Court should hold that the one anna four pies share in *tola* Begumpur passed under the conveyance to defendants 2 to 11, that plaintiff's right of pre-emption to that share also be declared, that the defendants be restrained from transferring the property or any portion of it pending the decision of the suit, and that the plaintiff do recover her costs from them.

The suit was contested by the defendants 2 to 11, who filed their written statement on 16th June 1905, and issues were fixed on the 27th September 1905. Thereafter on the 11th July 1906 when the suit was ripe for hearing, a petition was filed on behalf of defendants 2 to 11 praying that the Court would first take up the first issue and decide whether the plaintiff had a cause of action. It was alleged that, as the plaintiff and the vendees were not Mahomedans, there could be no right of pre-emption in favor of the plaintiff and that the existence of any

cannot be called upon to furnish security in respect of money to be received by him on behalf of his minor brother, who was made a co-plaintiff in order to obtain a joint decree for rent. The adult plaintiff represents the joint family, including the minor co-plaintiff: the decretal amount belongs just as much to the joint family as to the minor brother.

It is not necessary to consider the case of mortgage suits or other cases where minor plaintiffs are represented by guardians *ad litem* who are managing members under the Mitakshara system.

For these reasons, I agree that this Rule must be made absolute.

Rule absolute.

C. B.

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For a proper understanding of the cases set up by the two parties it is necessary to set out the following facts. *Mehal* Motihari consists of 31 villages. The plaintiff Maharani Janki Koer has shares in 18 out of these 31 villages. The defendant No. 1 had shares in 24 villages out of the 31, but the Maharani had shares in 16 only out of these 24 villages. In the assessment of the *mehal* the revenue derivable from each village is separately stated, but the *mehal* forms a single estate in the Collectorate rent roll, and the whole *mehal* is liable to sale for arrears due from any of the proprietors.

Before this Court a suggestion was made that in the circumstances stated the plaintiff could not be regarded as a co-sharer with the defendant No. 1, so as to entitle her to a right of pre-emption in respect of shares in villages sold by defendant No. 1, in which the plaintiff had no interest. We may say at once that in our opinion this argument has no substance. The plaintiff and defendant No. 1 were co-sharers in the whole *mehal*, and, as such, each would be entitled to assert their right of pre-emption in respect of any property comprised in the *mehal* sold by one of them to a stranger.

It seems that negotiations for the sale of the share of defendant No. 1 in the *mehal* were entered into with the Sahus (the defendants 2 to 11) in the early part of July 1904. In those negotiations Amirul Hussain is said to have acted as general agent of defendant No. 1 and to have been assisted by Nazir Hussain, a *mukhtar* of the Criminal Courts. Defendant No. 1 has been residing all along in Gya, while the Sahus are merchants in Motihari in the district of Champaran. It appears also that at the same time negotiations were going on between defendant No. 2, Jadu, and another co-sharer in *mehal* Motihari, Khaja Obedullah, for the purchase of Obedullah's share in the *mehal*. On the 14th July 1904 Mr. Irwin, manager of the Motihari Indigo concern, wrote to Mr. Lowis, the manager under the Court of Wards in charge of the estate of the plaintiff, to say that Nazir Hussain, *mukhtar*, had offered to arrange a sale to him of Khaja Obedullah's share for Rs. 50,000, and that he had heard that Jadu Lal Sahu and others (the defendants 2 to 11), merchants in Motihari, were negotiating for the purchase of the

Directions by the Court may be necessary, but they are not appealable.

Babu Luchmi Narain Singh for the appellant. Section 588 of the Civil Procedure Code is comprehensive, but vague.

RAMPINI AND SHARFUDDIN, JJ. This appeal purports to be against an order of the Deputy Commissioner of Dumka, dated the 26th February, 1907, in respect of certain accounts filed before him by a gentleman, who had been appointed *ad interim* receiver to a certain estate. This receiver has now been removed from the management and has submitted his accounts to the Deputy Commissioner, who has considered the accounts and given certain instructions with regard to them. Now the petitioner Rani Keshobati Kumari has appealed to this Court, saying that she is not satisfied with the order passed by the Deputy Commissioner on the 26th February, 1907.

A preliminary objection has been taken by the respondent to the hearing of the appeal, namely, that no appeal lies. The pleader for the would-be appellant maintains that the order of the Deputy Commissioner is appealable under clause 24 to section 588 of the Code of Civil Procedure. Clause 24 of that section gives an appeal against orders under section 503 of the Code of Civil Procedure. Now, the orders, which appear to be appealable under section 503, are of four classes, *first*, orders appointing a receiver, *secondly*, orders removing a person, in whose possession or custody the property may be, from the possession or custody thereof, *thirdly*, orders committing property to the custody or management of a receiver, and, *fourthly*, orders granting to such receiver such fee or commission on the rents and profits of the property by way of commission as the Court thinks fit.

The learned pleader for the appellant contends that the order, which the Deputy Commissioner has passed, comes under clause (*f*) of section 503. But clause (*f*) of section 503 occurs in that part of the section, which enumerates the receiver's liabilities; and it does not, it seems to us, contemplate the passing of any orders by the Court. This clause says that "every receiver so appointed shall pass his accounts at such periods and in such form as the

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arranging with Jadu Lal Sahu and Hiralal Sahu for the purchase by them of the shares of Mussammat Barkatunnessa, that is defendant No. 1, in *mehal* Motihari. He went on to say that he had heard the actual price settled on was Rs. 26,000, but that Rs. 50,000 would be entered in the deed to prevent the Raj from exercising its power of pre-emption. On the 27th July Mr. Lowis replied by letter saying the matter was being gone into. On the 27th July Mr. Irwin sent another letter to Mr. Lowis enclosing a telegram from Amirul Hussain with reference to the sale of Barkatunnessa Begum's share in *mehal* Motihari, and on the 28th July wrote another letter inclosing another telegram. On the 28th July Mr. Irwin telegraphed to Amirul Hussain that he had written to Bettia, and would send him a reply within a fortnight. On the 28th July Mr. Lowis wrote to Mr. Irwin asking him to send him the *patwaris* of Motihari with *jamabandis* for 1310 and 1311 showing the shares of Khaja Obedullah, Barkatunnessa Begum, and Azmannessa Begum, to enable him to compile the necessary schedules for submission to the authorities. On the 1st August Mr. Lowis sent Mr. Irwin a reminder to this letter. On the 3rd August Mr. Lowis wrote to Mr. Leslie, the solicitor to the Raj, requesting him to instruct the Raj *munshi* Hara Govind Sahai, to prepare a statement of all dues payable to Government by the above 3 shares, as also an account of the Raj and *malikana* Gopalpur, which information was sent by Mr. Leslie to Mr. Lowis in a letter of the same date.

While these steps were being taken on behalf of the Raj, it seems that on the night of the 24th July Jadu Lal Sahu with Amirul Hussain, Nazir Hussain, *mukhtar*, and others started from Motihari. It is said that the terms of the sale of the share of defendant No. 1 were then complete, and that they stopped at Mozufferpur to take further legal advice. On the afternoon of the 25th July they left Mozufferpur for Gya. On the 26th and 27th July negotiations for the sale are said to have been completed, and the deed prepared. The deed was executed by defendant No. 1 at 4 P.M. at Gya on the 28th July in her house, and on the 29th July the Sub-Registrar came to the house and the deed was registered.

The consideration shown in the deed as paid for the property was Rs. 39,969, out of which Rs. 18,300 was paid to the lady in

CIVIL RULE.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

RAMESHWAR SINGH
v.
RAGHUNATH SINGH.*

1908
Mar. 23.

Land Registration—Land Registration Act (Bengal Act VII of 1876) ss. 59, 63—Competent Court, meaning of, in s. 59—Jurisdiction—Revision by High Court, power of.

The High Court has jurisdiction under s. 622 of the Civil Procedure Code to revise an order made by a Civil Court under s. 59 of the Land Registration Act (Bengal Act VII of 1876).

Umatul Mehdi v. Kulsum (1) followed.

A Court having territorial, but no pecuniary jurisdiction, is not a competent Court within the meaning of s. 59 of the Act.

As soon as the certificate is sent to the Collector and he registers the names of the successful persons, the function of the Civil Court terminates and the High Court cannot thereafter interfere in the matter.

CIVIL RULE.

On the 7th of August, 1906 the petitioner purchased an eight-annas share in a certain mouza from one Mussamat Parijan, who again on the 24th of August, 1906 sold the said property to the opposite party, and they on the 29th of November, 1906 applied to the Collector of Gaya for registration of their names under Bengal Act VII of 1876 in respect of the said property. Thereafter on the 26th of February, 1907 the petitioner objected to the registration of the names of the opposite party and applied for registration of his own name in respect of the said property.

On the 21st of March, 1907 the Collector referred the case to the District Judge of Gaya under section 55 of the Act, who transferred it for determination to the Court of the Munsif of Gaya, who had jurisdiction to try suits valued up to Rs. 1,000, though the value of the subject-matter in dispute was admittedly more than Rs. 2,000.

* Civil Rule No. 3453 of 1907.

(1) (1907) I. L. R. 35 Calc. 120.

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she being an adult female, the manager had no right, having regard to the provisions of sections 49 and 50 of the Court of Wards Act, to purchase other landed property out of the estate. Both these the Subordinate Judge decided in favour of the plaintiff. He held that the power of the plaintiff as a Hindu widow to make acquisitions to the estate was unrestricted. We may observe that this point has been dropped in this Court. On the 2nd point he held that, even supposing the manager could not under the Act purchase fresh landed property out of the income, he certainly could do so out of the sums recently received as compensation for the acquisition of lands by Government out of the estate. He held, further, that the purchase was for the benefit of the plaintiff, and that there was nothing to prove that the manager did not assert the right of pre-emption with a view to purchase the property with her consent. In dealing with the issues the Subordinate Judge found that it was absolutely false that the agents of defendant No. 1 first made an offer to Mr. Lowis to sell the property to the Raj, and that he declined, but that on the contrary it was clear from the evidence that Mr. Lowis had all along been anxious to buy. Further the Subordinate Judge held, that it was not till the 13th August that Mr. Lowis for the first time became aware that the sale to the Sahus had been effected, and that, as he then performed the *talab-i-mowasibat*, the right of pre-emption in favour of the Raj was not lost. The Subordinate Judge held that Mr. Lowis was justified in treating the telegrams from Amirul Hussain to him as mere bluff to raise the price, and that the other telegrams and letters failed to convey correct or exact information of the property to be sold, or of the price, which was offered for it. The mere receipt of information that negotiations for sale were going on would not raise sufficient grounds for the assertion of the right of preemption.

The next issue taken up for disposal is issue No. 2, which runs as follows: Could the plaintiff p[illegible] preliminary ceremonies of *talab-i-mowasibat* and *tala*[illegible] manager and were those ceremonies [illegible] Subordinate Judge points out that the the manager could perform the cerem[illegible] the same admission has been made before

that, on the 18th December, 1907, the Collector directed the names of the opposite party to be registered in the register of estates as the proprietors in possession. In the meantime and on the 9th December, 1907, a rule was obtained from this Court on the opposite party to show cause why the order of the Munsif should not be set aside on the ground that he had no jurisdiction to try the case. The rule as worded would indicate that it was against the order declining to transfer the case, but it was really a rule against the order of the Munsif deciding the case in favour of the opposite party.

The first question that we have to decide in this case is whether we have jurisdiction under section 622 of the Civil Procedure Code to revise the order of the Civil Court. We have no doubt that we have such jurisdiction. Section 62 of Bengal Act VII of 1876 makes an order of the Civil Court final and not subject to appeal or order for review. It does not prevent our revising the order of the lower Court either under section 622 of the Civil Procedure Code, or under the Charter Act. This was also the view taken by a Division Bench of this Court in *Umatul Mehdi* v. *Kulsum*(1).

The second question is, had the Munsif jurisdiction to try the case, although the value of the property was over Rs. 2,000? Section 59 of the Act enables the principal Civil Court of the district, which is the Court of the District Judge, to transfer a case referred under section 55 of the Act to a competent Civil Court in the district. The competency of a Court consists in territorial as well as pecuniary jurisdiction. In this case there was territorial jurisdiction, but there was no pecuniary jurisdiction. The pecuniary jurisdiction of the Court must be regulated by the Bengal, North-Western Provinces and Assam Civil Courts Act, and under section 19 of that Act the extent of the jurisdiction of the Munsif cannot go beyond Rs. 2,000. The Court of the District Judge or the Subordinate Judge was the competent Court in this case, so far as pecuniary jurisdiction was concerned. The Munsif in our opinion ought not to have tried the case and the District Judge was wrong in transferring the case to him.

(1) (1907) I. L. R. 35 Calc. 120.

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of the property, as set out in the conveyance, with the object of defeating the right of pre-emption. He refers to the appearance of the notes themselves, the irregular edges on one side indicating that all four were torn off at the same time from four pieces of paper placed together or from a piece of paper folded 4 times. He points out that the endorsement of payment on each bears date the 28th July, that it is to say the day before the deed of conveyance was executed, and that this was necessary in order to induce the defendant No. 1 to allow those transactions to be entered in the deed. He further holds that the evidence adduced to prove the execution of the documents is contradictory and impossible of belief and that the entries in the books of account relied on to support them are not entitled to reliance. He also relies on the evidence of defendant No. 1 and her *gomasta* Wazir Lal to prove that the actual consideration paid for the property was Rs. 26,000 only.

The Subordinate Judge accepts a minor objection urged in respect of 5 *dhoors* of land in the district of Gya, and included in the deed, so that it might be registered in Gya, as not covered by the plaintiff's right of pre-emption, and, excluding that from the relief granted, he gives the plaintiff a decree declaring her right of pre-emption in the property claimed and directing that, if the plaintiff within 2 months pays Rs. 26,000 to the defendants 2 to 11, she will be entitled to a reconveyance to her from them of the property.

The defendants 2 to 11 have appealed.

The first point, which has been taken in arguing the appeal before us, is that the Subordinate Judge erred in law in holding that the plaintiff in this case had proved her claim to her right of pre-emption over the property sold by defendant No. 1 to defendants 2 to 12. It has been contended on behalf of the appellants that the plaintiff was bound to assert in her plaint that she had such a right and afterwards she was bound to prove it. As regards the omission to assert the right in the plaint we are of opinion that the view taken by the Subordinate Judge is correct. The fact of the existence of the custom, under which Hindus had the same right of pre-emption under the Mahomedan law as Mahomedans in the district of Champaran, was so generally

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Coxe.

1908
Jan. 31.

JADU LAL SAHU

v.

JANKI KOER.*

Mahomedan Law—Pre-emption—Customary right—Hindus of Bihar—Pleadings—Right of pre-emption, assertion of—Proof—Delay in assertion—When to be made—Formalities—Who can perform—Manager of adult female under Court of Wards, rights and duties of—Court of Wards Act (Bengal Act IX of 1879), ss. 14, 39, 40, 45, 49, 60—Bengal Estates Partition Act (Bengal Act V of 1897), ss. 29, 95.

The Hindus of Bihar have adopted the Mahomedan law of pre-emption for a long time.

Fukeer Rawot v. *Sheikh Emambuksh* (1) followed.

Champaran has from the earliest times been included as one of the districts forming the subah of Bihar, and as a judicial district it has all along, tillquite lately, been united with Saran, in which the existence of the custom of pre-emption has been judicially recognized.

Meethun Lal v. *Deo Murat*(2) referred to.

When the existence of the custom, under which Hindus have the same right of pre-emption under the Mahomedan law as Mahomedans in any district, is generally known and judicially recognised, it is not necessary to assert or prove it.

Fukeer Rawot v. *Sheikh Emambuksh*(1) explained.

There must be no delay in the assertion of the claim of pre-emption or *talab-i-mowasibat*, but before the *shafee* or pre emptor can assert his right to pre-emption, he must be satisfied by evidence, which he holds to be credible, that a sale has been completed.

Muhammad Wilayat Ali Khan v. *Abdul Rab*(3) distinguished and *Begam* v. *Muhammad Yakub* (4) followed.

Under the Mahomedan law, before it can be held that the sale is complete, there must be a cessation of the vendor's right in the property, and the solution of this matter is to be found in determining in each case what the intention of the parties was.

* Appeal from Original Decree, No. 410 of 1906, against the decree of J. N. Chuckerbutty, Offg. Subordinate Judge of Mozafferpore, dated July 14, 1906.

(1) (1863) W. R. (F.B.) 143.
(2) (1837) 6 Sel. Rep. 197.
(3) (1888) I. L. R. 11 All. 108.
(4) (1894) I. L. R. 16 All. 344.

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case of *Mathura Lal v. Deo Narain*(1), which was a case from the adjoining district of Tirhut.

Reliance on behalf of the appellants has, however, been placed on the passage of the judgment in the case of *Fakir Rawot v. Sheikh Emambaksh*(2), which runs as follows: "We think the established law is clear enough that the right or custom of pre-emption is recognized as prevailing amongst Hindus in Behar and some other provinces of Western India, that in districts where its existence has not been judicially noticed, the custom will be matter to be proved, &c." And it has been argued that, as in none of the cases referred to above has it been distinctly held that the custom has been judicially noticed in the district of Champaran, therefore the plaintiff in the present case was bound to prove by evidence the existence of the custom. In my opinion the argument is not sound. The districts, referred to in the passage in question, are, in our opinion, districts outside the old province or Subah of Bihar, and this in our opinion is clear from the context. Champaran has from the earliest times been included as one of the districts forming the Subah of Bihar, and as a judicial district it has all along, till quite lately, been united with Saran, in which the existence of the custom has been judicially recognised.

The fact that, in the case which came before the Courts from Purnea, it was thought necessary to prove the existence of the custom cannot be held to support the argument for the appellant, as a reference to the authorities will show that Purnea did not form a part of the old Subah of Bihar.

Other authorities in support of the existence of the custom are Wilson's Digest of Mahomedan Law, Art. 351, p. 390, and Amir Ali's Mahomedan Law, p. 590, though possibly the description given of the custom as "Territorial Law" in the latter authority may not be strictly correct.

As to the existence of the custom among Hindus in the district of Champaran and to its having been judicially recognised, we are of opinion, therefore, that there can be no reasonable ground for doubt. The next point, which has been raised by the appellants is, that had the ... necessity to support the claim for pre-emption, as Mahomedan

(1) [illegible] Rep. 107.

(2) (1863) W. R. F. B. Vol. 143.

consideration of Rs. 26,000 only, though in the *kabala* Rs. 39,969 had been falsely stated to be the consideration money. The plaintiff's estate was then under the management of the Court of Wards, and Mr. Lowis, the manager, performed the *talab-i-mowasibat* at Bettia, as soon as he heard of the sale and the *talab-i-ishtishad* in time at Motihari. It was further alleged in the plaint that the plaintiff had purchased an 1 anna 4 pie 16 krants share of *tola* Begumpur appertaining to the *mehal* in dispute from the defendant No. 1 soon after the date of sale of the disputed property, and that this share, though not covered by the *kabala* of the defendants Nos. 2 to 11, the plaintiff believed the latter claimed, as having passed to them also under their sale deed.

The plaintiff therefore prayed that her right of pre-emption might be declared in respect of the undivided share of the defendant No. 1 in the various villages comprising *mehal* Motihari, save and except the share in *tola* Begumpur aforesaid, which had been sold to the defendants Nos. 2 to 11, that an enquiry be made as to the actual amount paid by the defendants Nos. 2 to 11 to the defendant No. 1 as consideration money of the *kabala* and that it might be ordered, upon the plaintiff's paying to the aforesaid defendants the actual consideration money so determined, the said defendants Nos. 2 to 11 do convey to the plaintiff all the shares of the *mehal*, which they had purchased from the defendant No. 1 under the *kabala* dated 28th July 1904. There was also a prayer in the alternative that in case the Court held that the said share of one anna four pies and sixteen krants of *tola* Begumpur had passed to the defendants Nos. 2 to 11 under their sale deed, it might be declared that the plaintiff had a right of pre-emption in respect of that share also.

Defendant No. 1 filed a written statement and defendants Nos. 2 to 11, who really contested the suit, filed another. Their contentions were (1) that the plaintiff had no cause of action, (2) that the plaintiff could not legally perform both the *talab-i-mowasibat* and the *talab-i-ishtishad* through her manager, (3) that these two preliminary ceremonies were not duly performed, (4) that the plaintiff's manager had knowledge of the defendants' purchase long before the 13th August 1904, the date on which

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present case, unless we hold that Mr. Lowis had heard of the sale before he received the letter from Mr. Leslie on the 13th August. The last mentioned case is clearly distinguishable from the present, as in it the claim to pre-emption was based on the *wajib-ul-arz* of the village.

For the respondents it has been contended that the case now put forward is not that on which the defendants-appellants originally relied. In the plaint it was distinctly asserted that the first intimation Mr. Lowis received of the sale was in the letter received from Mr. Leslie on the 13th August, and yet in the written statement this allegation was not distinctly controverted, the only case then set up being that the two ceremonies were not duly performed. In the issues it is true (see issue 4) an advance was made and the question was raised, whether the plaintiff or Mr. Lowis was aware of the proposal for sale made to defendants Nos. 2 to 12.

It has next been contended for the respondents that under the Mahomedan law Mr. Lowis was not required to make enquiry, when he heard of the proposal, and that under the law he could not perform the *talab-i-mowasibat*, until he had heard that there had been an actual sale. The different telegrams and letters, which passed between Mr. Lowis, Mr. Irwin, Mr. Leslie, and Amirul Hussain, have been already set out in this judgment, in dealing with the case as laid before the Subordinate Judge. It has been argued that the Subordinate Judge was right in holding that Mr. Lowis was justified in regarding the telegrams, which he received from Amirul Hussain, of the 26th, 27th, and 28th July, as mere bluff to raise the price of the property, as Mr. Lowis in his evidence says he regarded them, and that the telegram of the 29th July, which Mr. Lowis sent to Amirul Hussain, disclosed that so far from refusing to purchase the share for the sale of which negotiations were going on with Jadu Lal, he was always anxious to buy it on behalf of the Raj. It has been pointed out that the original information, which Mr. Lowis received from Mr. Irwin, was with regard to the sale of the share of Khaja Obedulla (see Mr. Irwin's letter of the 14th July), and that it was not till the 26th July that Mr. Lowis received news of the proposed sale of the share of the defendant

though she had information of the proposed sale in time. There is no equity in her favour. It must be held she declined to purchase. See *Bhairon Singh* v. *Lalman*(1). The plaintiff moreover had no right of pre-emption, as the estate was under partition and an order must have been passed under s. 29 of the Estates Partition Act, 1897, destroying the right of pre-emption. The plaintiff also had lost the right by purchasing a portion of the property, as such is the doctrine of Mahomedan law. If, however, it be held that the right subsisted, she should have trictly observed the rules of the Mahomedan law. *First:* there should be no delay in performing the *talab-i mowasibat: Jhootee Singh* v. *Komul Roy*(2), *Ram Churn* v. *Nurhur Mahton*(3), *Bhodo Mahomed* v. *Radha Churn Bolia*(4), *Nubee Buksh* v. *Kaloo Lushker*(5), *Ali Muhammad* v. *Taj Muhammad*(6), *Bhairon Singh* v. *Lalman*(1), *Jarfan Khan* v. *Jabbar Meah*(7), *Muhammad Wilayat Ali Khan* v. *Abdul Rab*(8), *Begam* v. *Muhammad Yakub*(9). *Second*, the *talab-i-ishtishad* must make mention of having performed the *talab-i-mowasibat*, must be in time, and must be performed in presence of the witnesses and of the person in possession of the lands, *i.e.*, either the vendor or the purchaser. See *Jhootee Singh* v. *Komul Roy*(2), *Prokas Singh* v. *Jogeswar Singh*(10), *Golakram Deb* v. *Brindaban Deb*(11), *Chamroo Pasban* v. *Puhlwan Roy*(12), *Rujjub Ali Chopedar* v. *Chundi Churn Bhadra*(13), *Ali Muhammad Khan* v. *Muhammad Said Husain*(14), *Mubarak Husain* v. *Kaniz Bano*(15). See also Macnaghten's Mahomedan Law (1825), p. 183, and Wilson's Digest of Mahomedan Law, 2nd Ed., p. 412. As to other cases showing how strictly it is necessary that all formalities be duly observed and on the question of ratification, see *Wahed Ali Khan* v. *Hunooman Pershad*(16), *Nubee Buksh* v. *Kaloo Lushker*(17), *Bolton Partners* v. *Lambert*(18). See also Shephard and Cunningham's Contract Act, 9th Ed.,

(1) (1884) I. L. R. 7 All. 23.
(2) (1868) 10 W. R. 119.
(3) (1870) 13 W. R. 259.
(4) (1870) 13 W. R. 332.
(5) (1874) 22 W. R. C. R. 4
(6) (1876) I. L. R. 1 All. 283.
(7) (1884) I. L. R. 10 Calc. 383.
(8) (1888) I. L. R. 11 All. 108.
(9) (1894) I. L. R. 16 All. 344.
(10) (1868) 2 B. L. R. A. C. J. 12.
(11) (1870) 6 B. L. R. 165.
(12) (1871) 16 W. R. C. R. 3.
(13) (1890) I. L. R. 17 Calc. 541.
(14) (1896) I. L. R. 18 All. 309.
(15) (1904) I. L. R. 27 All. 160.
(16) (1869) 12 W. R. 454.
(17) (1874) 22 W. R. 4.
(18) (1888) L. R. 41 Ch. D. 295.

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assert his right to pre-emption, he must be satisfied by evidence, which he holds to be credible, that a sale has been completed. The same view is taken in Baillie's Digest of Mahomedan Law, part 2, page 484, Macnaghten's Mahomedan Law, page 196, and Amir Ali's Mahomedan Law, page 6.6, where it is distinctly laid down that, if the demand be made, while negotiations are going on between the vendor and vendee, it is of no avail. It is also clear from the authorities that the information, which the *shafee* receives, must be correct as regards the amount of purchase money, the property to be sold, and the person to whom it has been sold (see Baillie's Digest, p. 501).

In the present instance the information, which Mr. Lowis received from Mr. Irwin, was merely hearsay, and it related to the share of Khaja Obedullo, and not to the share of defendant No. 1. The information received from Amirul Hussain differed as to the price from that given by Mr. Irwin, and was incorrect as has been found by the Subordinate Judge. Mr. Lowis says that he did not believe the information, which he received from Amirul Hussain, but treated it as bluff. The learned counsel for the appellants has contended that no reasonable person in Mr. Lowis' position could have come to any other conclusion on receipt of the telegrams from Amirul Hussain than that there had been a complete sale. We see no reason to differ from the conclusion of the Subordinate Judge that Mr. Lowis in fact treated the telegrams as mere bluff to raise the price and that Mr. Lowis [illegible] justified in his belief. The case of *Lajja Prasad* v. *Debi* [illegible] [illegible]ports the view that the right of pre emption is not lo[illegible] [illegible] refuses to act on information, which he dis[illegible]

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[illegible] All. 236.

is distinguishable, however, as there the claim was based on the *wajib-ul-arz* of the village. See also Baillie's Digest (1865), p. 483, Hamilton's Hedaya, 2nd Ed., p. 551, McNaghten, p. 196, Wilson's Digest, p. 407 (Art. 371), Amir Ali, p. 606. Under Mahomedan law, for the sale to be complete, the vendor's right must absolutely cease: *Begam* v. *Muhammad Yakub*(1). To ascertain, when the right of the vendor ceased in the property, you cannot refer to the Mahomedan law. It is a question of fact. See Transfer of Property Act, s. 54. The right is not lost, if *shafee* refuses to act on information, which he disbelieves: *Laya Prasad* v. *Debi Prasad*(2). In this case the purchase-money was not paid before the registration, and thus the sale was not complete. See Baillie's Digest, p. 501; Shama Charan Sarkar's Mahomedan Law, p. 457, and *Najm-un-nissa* v. *Ajaib Ali Khan*(3). On the question of delay in making the *talab-i-ishtishad,* there is no hard-and-fast rule: *Jumeelun* v. *Luteef Hossein*(4). There is no positive rule of Mahomedan law that it must be performed in any particular place. The formalities insisted on by Mahomedan law with regard to the *talab-i-ishtishad* are meant only to establish proof of the fact that the claim was really made by the pre-emptor and not for the knowledge of the vendor. *Mubarak Husain* v. *Kaniz Bano*(5) goes beyond Mahomedan law. These are really questions of fact: *Jumeelun* v. *Luteef Hossein*(4), *Munna Khan* v. *Chheda Singh*(6). On the question whether the manager or guardian under the Court of Wards Act can perform the *talab-i-ishtishad* for an adult female ward, see *Abadi Begam* v. *Inam Begam*(7), *Lal Bahadur Singh* v. *Durga Singh*(8), *Harihar Dat* v. *Sheo Prasad*(9), *Umrao Singh* v. *Dalip Singh*(10). In this case, moreover, the guardian had the authority to act as agent. See *Wahed Ali Khan* v. *Hunooman Pershad*(11), *Abadi Begam* v. *Inam Begam*(7), *Harihar Dat* v. *Sheo Prasad*(9), *Beti Maharani* v. *Collector of Etawah*(12), *Ali Muhammad Khan* v. *Muhammad Said*

(1) (1894) I. L. R. 16 All. 344.
(2) (1880) I. L. R. 3 All. 236.
(3) (1900) I. L. R. 22 All. 343.
(4) (1871) 16 W. R. F. B. 13.
(5) (1904) I. L. R. 27 All. 160.
(6) (1906) I. L. R. 28 All. 691.
(7) (1877) I. L. R. 1 All. 521.
(8) (1881) I. L. R. 3 All. 437.
(9) (1884) I. L. R. 7 All. 41.
(10) (1901) I. L. R. 23 All. 129.
(11) (1869) 12 W. R. 484.
(12) (1894) I. L. R. 17 All. 198.

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In the present instance the information, which Mr. Lowis received from Mr. Irwin, was merely hearsay, and it related to the share of Khaja Obedulla, and not to the share of defendant No. 1. The information received from Amirul Hussain differed as to the price from that given by Mr. Irwin, and was incorrect as has been found by the Subordinate Judge. Mr. Lowis says that he did not believe the information, which he received from Amirul Hussain, but treated it as bluff. The learned counsel for the appellants has contended that no reasonable person in Mr. Lowis' position could have come to any other conclusion on receipt of the telegrams from Amirul Hussain than that there had been a complete sale. We see no reason to differ from the conclusion of the Subordinate Judge that Mr. Lowis in fact treated the telegrams as mere bluff to raise the price and that Mr. Lowis v...stified in his belief. The case of *Lajja Prasad* v. *Debi*
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junction (*ittisal*) of the property (*mulk*) of pre-emption with the property sold. The *shurt* does not arise until after *sabab.* The next demand or *ishtishad* must be performed in time such as to show the continuation of the mental inclination towards *shoofa*. Every case depends on its own facts. As regards the *mujlis* it must be one of *ilm* or knowledge and not one to lead to enquiry or *tuhkeekat*. See Merotool Oosool, p. 196, on "*Byon-i-Zuroorut*" or what conduct amounts to a statement, although not expressed in Ulorder. Lastly, as to the right of Hindus to exercise the right of pre-emption. Apart from custom an infidel is a fit *ahul* or proper person to claim pre-emption. See portions of *Shera* that are binding on all subjects. See Baillie's Digest, 2nd Ed., p. 169, on 'the Marriage of Infidels,' p. 174, on 'foreigners residing,' and pp. 215, 272, 473. See also articles on Mahomedan law in the short notes portion of 1 C. L. J., 2 C. L J. and 6 C. L. J , and stray texts upon pre-emption translated and printed in 7 C. L. J., pp. 1-13. On the right of the guardian's authority to perform the ceremonies of pre-emption, the Mahomedan law gives him full power. A lady, whose property is under the control of the Court of Wards, is in the position of a *sufee*, whose acts would have no effect, i.e., *hazl* or "a jest."

The Advocate-General (Mr. P. O'Kincaly), in reply.

BREIT J. The present appeal arises out of a suit brought by the plaintiff-respondent to assert a right of pre-emption in respect of the undivided shares in certain villages comprised in *mehal* Motihari, *tauzi* No. 644, in the district of Champaran, which belonged to defendant No. 1, and which she sold to defendants 2 to 11 by a registered deed of conveyance on the [illegible] July, 1904 The plaint states that a share of one anna four pies in *tola* Begumpur, M. Belbanwa, was excluded from the sale, and was sold by defendant No. 1 to the plaintiffs by a deed of conveyance dated the 24th February, 1905, but the defendants 2 to 11 claimed that share also as covered by the deed of sale. The plaintiff is the Maharani Janki Koer of Bettia, and as her estate is under the management of the Court of Wards, she appears in the suit through Mr. Lowis, the manager of the estate appointed

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It has not been seriously contended that the *talab-i-mowasibat* was not performed by Mr. Lowis in strict accordance with the provisions of the Mahomedan law or that he had not power under the law to perform that ceremony in asserting the right on behalf of the Maharani, the plaintiff. I hold, therefore, that the *talab-i-mowasibat* was correctly performed in accordance with law and in due time.

It has next been contended on behalf of the appellants that Mr. Lowis did not perform the *talab-i-ishhad* in due time after the performance of the *talab-i-mowasibat*, that he ought to have performed that ceremony on the 14th August, and not to have waited till the 15th August, and that the delay is fatal to the plaintiff's claim. Further it has been urged that the ceremony was not performed in compliance with the Mahomedan law, as it was not performed in the presence of the vendor or vendee or on any portion of the property sold. The ceremony in the Raj *kachari*, or law office, is said to have been of no avail, as it was not made in a place open to the public, and therefore the ceremony was not performed in such a way as to give information to the vendor and vendee, and in support of this argument reliance is placed on the case of *Mubarak Husain* v. *Kaniz Bano*(1). It has been argued that the performance of the ceremony in the Collector's Office was of no use, as that building having been acquired by Government under the Land Acquisition Act, had ceased to form any part of *mahal* Motihari, and thus of the property sold to defendants 2 to 11.

I have carefully considered these arguments and in my opinion they cannot prevail. In the Hedaya it is laid down that the *talab-i-ishhad* must be made as soon as conveniently may be after the *talab-i-mowasibat*. Mr. Lowis in his evidence explains that it was not possible for him to go from Bettia to Motihari by road to make the claim as the distance was 30 miles and it was the rainy season. He says he did not go on the 14th August, because in the first instance that day was a Sunday and in the second he would have found the Courts and offices closed and would not have been able to find out whether the deed of conveyance had been registered or to find the vendor or vendee.

(1) (1904) I. L. R. 27 All. 160.

local custom prevailing in the district of Champaran, under which the plaintiff could claim the right, had not been alleged in the plaint and did not exist there. The plaintiff objected to this issue being raised at that stage as it was not raised by the defendants in their written statement. The Subordinate Judge took up this question for disposal on the 14th July 1906 and held that, as the defendants had purposely refrained from raising the point in their written statement, they could not be allowed to raise it at that stage, that, if evidence were entered into, the enquiry into the question would involve enormous cost, and that furthermore from Amir Ali's Mahomedan Law, 3rd Ed., page 596, in which reference is made to decided cases, and from the decisions in the cases reported in *Fukeer Rawot* v *Sheikh Emambuksh*(1), *Ram Doolar Misser* v. *Jhumuck Lall Misser*(2), *Sheojuttun Roy* v. *Anwar Ali*(3), *Meethun Lal* v. *Deo Murat*(4), *Parsasth Nath Tewari* v. *Dhanai Ojha*(5), *Govind Dayal* v. *Inayatullah*(6), it was clear that the Hindus of Bihar have adopted the Mahomedan law of pre-emption for a long time. The Subordinate Judge accordingly decided the point in favour of the plaintiff Evidence on the other issues was then gone into and the case was disposed of on the 17th September 1906.

The case for defendants Nos. 2 to 11 was that the plaintiff could not perform the ceremonies of *talab-i-mowasibat* and *talab-i-ishtishad* through her manager and that the ceremonies were not duly performed; that the plaintiff's manager was aware that the property was being sold long before the 13th August 1904, and that, as he refused to pay a proper price for it, the property was sold to defendants 2 to 11; that the one anna four pies share in *tola* Begumpur, which the plaintiff claims to have purchased in February 1905, was covered by the deed of conveyance executed in favour of the defendants on the 24th July 1904, and that the plaintiff, on account of her subsequent purchase, had lost her right of pre-emption; and that the consideration money mentioned in the sale deed is the actual price paid by them for the disputed property.

(1) (1863) W. R. F. B. 143.
(2) (1872) 17 W. R. 264.
(3) (1870) 13 W. R. 139.
(4) (1837) 6 Sel. Rep. 197.
(5) (1905) 9 C. W. N. 874.
(6) (1885) I. L. R. 7 All. 775.

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Muhammad Said Husain(1) and the Full Bench case of *Rujjub Ali Chopedar* v. *Chundi Churn Bhadra*(2), to which we have been referred on behalf of the appellants as laying down how the *talab-i-ishtishad* should be performed. They simply follow the Mahomedan law in laying down that the ceremony should be performed in the presence of the witnesses, either in the presence of the vendor or vendee or on the property sold. The only question we have to decide is whether the performance of the ceremony by Mr. Lowis in the Raj *kachari* or in the Collector's office was sufficient compliance with the law. It is not disputed that the ceremony was performed in the proper way. There can in my opinion be no doubt that the Raj *kachari* or law office is situated on the part of the property sold, and in my opinion the performance of that ceremony in the *kachari* or law office was a sufficient compliance with the law. The *kachari* or law office, as is well known, is open to all the tenants of the estate and, even if it were not, I do not think that fact would affect the validity of the ceremony. The subsequent repetition of the ceremony in the Collectorate was unnecessary. Undoubtedly its object was to inform the vendor and vendee, especially as we find that Nazir Hussain was discovered and brought in to be present at the ceremony. There seems however little reason for doubt that, after the land, on which the Collectorate building stands, had been acquired by Government, the building itself cannot be held to be a portion of the property sold. As however the repetition of the ceremony was unnecessary, this fact is not of importance.

I hold, therefore, that the ceremony of the *talab-i-ishtishad* was duly and legally performed by Mr. Lowis on behalf of the plaintiff and within due time.

The next question raised has been whether Mr. Lowis, as manager appointed under the Court of Wards, had power to perform the *talab-i-ishtishad* on behalf of the plaintiff. It is admitted that he had power to perform the *talab-i-mowasibat*. Since the Court of Wards have taken charge of the Bettia Raj, the plaintiff is not in a position to exercise rights over her own property and is in the position of a ward of the Court, and the manager of the estate appointed by the Court of Wards is in the

(1) (1896) I. L. R. 18 All. 309. (2) (1890) I. L. R. 17 Calc. 543.

share. He wrote to inform Mr. Lowis in case he might wish to buy for the Maharani. The manager, Mr. Lowis, sent on the letter to Mr. Leslie, solicitor of the Raj, on the 16th July 1904 for inquiry. On the 24th July Mr. Leslie wrote to Mr. Lowis saying that Nazir Hussain appears to be effecting a contract of sale between the Khajas and Jadu Lal for the share in Motihari referred to in his previous letter, and that Nazir Hussain and the Sahus were leaving for Gya that evening to complete the contract. Mr. Lowis on the 25th July telegraphed and wrote for further information and to have the Raj *tehsildar* sent to him. In the morning of the 26th July Amirul Hussain, the agent of defendant No. 1, sent Mr. Lowis a telegram from Mozufferpur saying that he with Jadu Lal, Hiralal and Nazir Hussain had left Motihari for Mozufferpur to show to the vakil Motihari's draft sale deed, that they would start for Gya in the afternoon, that the sale deed would be registered the next day at Gya and that, if the Raj wanted to purchase, they must wire with consideration money to Gya. Another telegram was sent by the same person to Mr. Lowis on the 27th July from Gya to the effect that, if the Raj wished to purchase, the manager must decide and send the money sharp, and again another on the same day to say Jadu Lal was pressing for registration. On the 28th July Mr. Lowis telegraphed to Amirul Hussain that he hoped to purchase for the Raj at a reasonable figure, and requesting him to come with the papers, and on the same day wrote confirming the telegram. On the same day Amirul Hussain sent a telegram to Mr. Lowis saying that the net income was Rs. 1,516, that Jadu Lal was offering Rs. 30,000 and asking him to wire, if the Raj wanted to give more. He added that he could not come to Mr. Lowis as Jadu Lal might break off. On the 29th July Mr. Lowis telegraphed to Amirul Hussain saying that the Raj had the right of pre-emption, that he could not carry on negotiations for sale without seeing the *jamabandis*, and on the same date wrote a letter confirming the telegram.

Meanwhile on the 26th July Mr. Irwin had written to say that he had heard that Amirul Hussain, *mukhtar* of Mussammat Barkatunnessa (defendant No. 1) had arrived in Motihari, and was lodging with *mukhtar* Nazir Hussain, and they both were

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lays down the general powers of the Court, provides that it may, through its manager, do all such things requisite for the proper care and management of any property, &c., as the proprietor of any such property, if not disqualified, might do for its care and management. This provision is no doubt subject to the other provisions of the Act. The exercise of the right of pre-emption is one connected with the care and management of the property, as it is given with the object of preventing the introduction as co-sharers of an estate of persons, who might affect injuriously its management. The introduction of interests, which may become conflicting, is certainly a matter affecting the management of the estate. Clearly in such a case the owner could claim the right of pre-emption, and it seems difficult to hold that under the Act itself, in spite of the provisions in Part II, the manager would not have such a power. Section 40 of that part however in laying down the general duty of the manager provides that in the management of the property he shall in every respect act to the best of his judgment for the Ward's interest, as if the property were his own. This section would give him the right to claim the right of pre-emption, if that act can be held to be one falling within the care and management of the property, and I can see no reason for holding that it does not.

The learned Maulvi, who has argued this point on behalf of the respondent, has contended that the plaintiff during the period that her property is under the Court of Wards is in the position under the Mahomedan law of a "*sufee*", any act of whom would be treated as "*hazl*" or a jest, and therefore ineffective. In those conditions she is in the same position as a minor, on whose behalf under the Mahomedan law the guardian would have full authority to act.

Undoubtedly under his ordinary powers as agent under the law the manager would have power to claim the right of pre-emption on behalf of his principal, and I do not think that the provisions of the Court of Wards Act could be held to operate to deprive him of that power.

Whether as guardian acting for the ward, or as manager acting under the Court of Wards Act, or as agent of the lady, the manager Mr. Lowis had in my opinion authority to assert on

Government currency notes and Rs. 1,414 in cash, making a total of Rs. 19,714. The balance amounting to Rs. 20,253 was set off against the following debts alleged to have been outstanding against the lady, that is to say, of Rs. 4,364 due on a mortgage bond executed by her in favour of the vendees on the 24th September, 1902, Rs. 1,922 due on a mortgage bond dated the 5th May, 1903 executed by her in favour of Braj Mohan Lal and another, which encumbrance the vendees had to pay off, and Rs. 13,967 due on four handnotes: (1) dated 13th April, 1904 for Rs. 4,974, (2) dated 15th May, 1904 for Rs. 3,023, (3) dated 13th June, 1904 for Rs. 4,009 and (4) dated 14th July, 1904 for Rs. 1,960.

On the 13th August, 1904 Mr. Lowis received a letter from Mr. Leslie dated 11th August stating that Mussammat Barkatunnessa had sold her share in *mehal* Motihari to Jadu Lal Sahu of Motihari. On receipt of that letter, after reading the first paragraph and before reading the rest of the letter, Mr. Lowis performed the ceremony of *talab-i-mowasibat*, and on the same date he sent a copy to the Collector stating that he had claimed the right of pre-emption on behalf of the Maharani and had directed Mr. Leslie to draw up the necessary brief and proposal for submission to the higher authorities.

The 14th July was a Sunday. On the 15th July Mr. Lowis went from Bettia to Motihari and performed in the presence of witnesses the *talab-i-ishtishad*, first in the Raj *kachari* and afterwards in the Collector's office, after having ascertained from the Registration office, that the sale had been completed and the deed registered in Gya. The present suit was instituted on the 10th March, 1905.

It will be convenient to take the issues in the order in which they have been dealt with in the lower Court. Issues 3 and 4 are as follows: Was there any talk of sale of the disputed property with the plaintiff's manager and did he decline to purchase the same? Was the plaintiff or her manager aware of the proposal or sale to defendants Nos. 2 to 11 and did that take away the plaintiff's right of pre-emption. Two preliminary objections were taken on behalf of the defendants: (1) that the plaintiff being a Hindu widow had no right of pre-emption, and (2) that,

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of the Subordinate Judge, that they are fabricated and are not genuine. If the four documents be superimposed, one on the other, it will be found that the irregular edge on one of the sides of each exactly corresponds with the edges of the others, leaving no doubt that the 4 pieces of paper, on which the notes were written, were torn off at the same time from 4 sheets of paper placed one on the top of the other or from a piece of paper folded four times. Such a correspondence between the edges could not have occurred otherwise. I also agree with the Subordinate Judge that it was most unlikely that the defendants 2 to 11 would have lent such large sums of money on 4 occasions to the defendant No. 1, when *for a smaller sum they were careful to* take a mortgage-deed from her. Nor can I believe, if the documents were genuine, that no mention of interest would have been made in them or that the defendants would have endorsed them over as paid up the day before the deed of sale was finally executed and registered. The evidence, to prove the circumstances, under which the loans are said to have been made and the notes written, is in my opinion quite unworthy of credit, and the entries in the books produced to support them wholly unworthy of reliance. I therefore agree with the Subordinate Judge and hold that the actual price fixed for the sale of the property was Rs. 26,000 only, and did not include the sums covered by the 4 handnotes.

It has been suggested by the learned counsel that, even if the notes were fabricated, it was only a device sanctioned by the Mahomedan law for defeating the right of pre-emption. We think, however, it is clear from the authorities that the fabrication of the notes was not one of the devices permissible under the law. (See Hedaya, 563, Baillie, 505 and Macnaghten's Mahomedan Law, 49).

A further argument was advanced on behalf of the appellants that after the proceedings taken for partition of the whole estate had advanced to their present stage, there had been a division of the property, which would bar the right of pre-emption. An order under section 29 of the Act however would not have the effect of dividing the joint liability of the co-sharers for the revenue until the date mentioned in section 95 of the Partition Act had arrived.

that he could not perform the *talab-i-ishtishad.* The Subordinate Judge held, however, that the authorities, to which he refers in his judgment, were ample to support the view that the manager could perform the *talab-i-ishtishad* on behalf of the plaintiff. Further, he held that the *talab-i-mowasibat* was performed strictly in accordance with the provisions of the Mahomedan law. It was urged for the defendants that the delay of one day in performing the *talab-i-ishtishad* was fatal, that Mr. Lowis was not justified under the Mahomedan law in omitting to perform the ceremony on the 14th July, because it was a Sunday, and that the ceremony was invalid, as it was not performed in the presence of the vendor or vendees or on any part of the property sold. The Subordinate Judge held that the ceremony was performed as required by the Mahomedan law within reasonable time and without unnecessary delay and, therefore, that the delay over the Sunday was not fatal. The Subordinate Judge further held that the performance of the ceremony was otherwise valid, both the Collector's office and the Raj *kachari* standing within the property sold.

The 5th and 6th issues are as follows:—Was *tola* Begumpur purchased by the defendants 2 to 4 prior to the plaintiff's purchase? Is the subsequent purchase of *tola* Begumpur by the plaintiff invalid and does that purchase extinguish plaintiff's right of pre-emption? Relying on the *khewat* of *tola* Begumpur the Subordinate Judge held that defendant No. 1 had 3 annas 1 pie 12 krant share in that *tola.* Under their deed of conveyance only an 8 pies 16 krants share in that *tola* was sold to the defendants 2 to 11. There was thus left to defendant No. 1 a 2 anna 4 pies 16 krants share, out of which a one anna four pies 16 krants share was sold to the plaintiff. The Subordinate Judge further held that by that purchase the plaintiff did not lose her right of pre-emption, and in fact the point was not pressed.

Lastly he deals with the question raised in the 7th issue, which is, what is the real consideration of the property sold, and he finds that it was Rs. 26,000 and not Rs. 39,967 as entered in the deed of conveyance. He finds that the entries relating to the four handnotes are all bogus transactions, and that the documents themselves were manufactured for the purpose of raising the price

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Sahai, on being sent for, told Mr. Lowis that he also had heard this rumour. But a statement that there is a rumour that a particular thing has happened is not a statement that that thing has happened; and there is not a scrap of direct and positive evidence that any statement that the sale had actually been effected was ever made to Mr. Lowis before the 13th August.

As regards the *talab-i-ishtishad* I agree that it was performed with the least practicable delay (see Macnaghten's Mahomedan Law, page 183, and Wilson's Digest, page 412). It may be conceded that the performance in the Collectorate was not in itself sufficient. It is quite clear that the site of the Collectorate has been acquired by Government and is no longer a portion of the property in suit. The award has not been filed, unless Exhibit T on page 451 of the paper-book is an incomplete portion of that document. But that the compensation awarded was paid into the credit of the proprietors is clear from Exhibit Q and this proves that the acquisition was completed. Exhibit V shows how this compensation was assessed, though there is an unexplained and probably unimportant discrepancy of Rs. 30. It included a sum of Rs. 220 on account of capitalised revenue. This may need a word of explanation. When a portion of an estate is acquired by Government, it necessarily follows that the proprietors have no longer to pay revenue on that portion. But as the revenue is a sum that has been fixed for more than a century, and is often divided into minute sums paid by numerous share-holders, it is evident that a small reduction may cause a great deal of inconvenience in correcting of the ...ectorate registers, and revising the amounts payable (See Hedaya, ...share-holders. Accordingly it is usual, when the Law, 49). ...he proprietors consent, to keep the revenue

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known and accepted, that it was not thought necessary to assert its existence. The fact that in their written statement filed on the 16th June 1905 the defendants never referred to the point and that, afterwards, they never asked that it should be distinctly raised in the issues, supports the same view.

As, however, the point has been raised and argued before us, it has been necessary to consider the objection taken on behalf of the appellants, and I hold that there is no real substance in it.

In support of the contention that the custom must be pleaded and proved, we have been referred to the cases of *Inder Narain Chowdhry* v. *Mohamed Nazu ooddeen*(1), which was a case from the district of Chittagong, of *Moheshee Lal* v. *Christian*(2), which was a case from the district of Bhagalpur, of *Mohesh Lal* v. *Christian*(3) also a case from Bhagalpur, of *Sheraj Ali Chowdhry* v. *Rumzan Bibee*(4), a case from the district of Dacca, and of *Kantee Ram* v. *Wulee Sahoo*(5), a case from the district of Purnea. It is not in my opinion necessary to discuss these rulings in detail as in my opinion they have no application to the present case. It is no doubt correct that when the existence of the custom in the district has not been judicially noticed, it must be asserted by a plaintiff and proved; but I am of opinion that the authorities on which the Subordinate Judge relies afford ample support to his conclusion that the existence of the custom among Hindus in the district of Champaran has been judicially recognised. In the case of *Joy Koer* v. *Suroop Narain Thakoor*(6), it was held to be a well known fact that the custom of pre-emption was recognised amongst Hindus in Bihar, and the same view was expressed by a Full Bench of this Court in the case of *Fukeer Rawot* v. *Sheikh Emambuksh*(7), as also by Division Benches in the case of *Sheojuttun Roy* v. *Anwar Ali*(8), and *Ram Doolar Misser* v. *Jhumuck Lall Misser*(9). The first of these was a case from Saran, with which up till lately Champaran was joined, as forming the jurisdiction of one District Court. The same view was also taken in the

(1) (1864) 1 W. R. 234.
(2) (1866) 6 W. R. 250.
(3) (1867) 8 W. R. 446.
(4) (1867) 8 W. R. 204.
(5) (1869) 11 W. R. 251.
(6) (1864) W. R. Gap. 259.
(7) (1863) W. R. F. B. 143.
(8) (1870) 13 W. R. 159.
(9) (1872) 17 W. R. 204.

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Another point taken is that, as the estate was under partition, an order must have been passed under section 29 of the Bengal Estates Partition Act, 1897, which would have the effect of dividing the shares of the proprietors so effectually as to destroy the right of pre-emption. This contention cannot, I think, be accepted. It appears to me that an order under section 29, supposing such an order to have been made, would make little or no difference to the position of proprietors, whose names, with the extent of their respective interests, are already registered in the Collector's books. The liability for the revenue, the land itself, and the tenants thereon remain joint, after an order is made under section 29, until the date specified in section 95 of the Act, and therefore it seems clear that, until the later date, the right of pre-emption subsists. See *Wahed Ali Khan* v. *Hunooman Pershad* (1). In the cases cited by the learned Advocate-General [*Gopal Sahi* v. *Ojoodh-apershad* (2) and *Jootraj Singh* v. *Toohun Singh* (3)] the partition had been completed. In the latter case the different lots had been numbered, a fact which shows that the last stage had been reached.

The last question to be decided is, whether a manager under the Court of Wards can perform the ceremonies of pre-emption on behalf of an adult female ward of Court. The learned Advocate-General concedes that a guardian can and should perform these ceremonies for a minor or lunatic, but contends that a manager under the Court of Wards is not a guardian and that his powers are limited by Statute. It is urged that the powers of the Court are limited by section 14 of the Bengal Court of Wards Act, 1879, to the performance of what is requisite for the proper care and management of the ward's property; and that the powers of the manager are limited by sections 39 and 40 to the management of the property. It is further pointed out that section 50 provides that the Court, after providing for the objects mentioned in section 49, may purchase other landed property for the ward. One of the objects mentioned in section 49 is the improvement of the land and property of the ward; and it is argued, therefore, that the wording of section 50 shows that the purchase of other

(1) (1872) 18 W. R. 494. (2) (1865) 3 W. R. 47.
(3) (1870) 14 W. R. 476.

were not performed in proper time or in strict accordance with the directions of the Mahomedan Law. In his Treatise on Mahomedan Law, Mr. Amir Ali points out that "the right of pre-emption is one *strictissimi juris* and the formalities necessary to be performed before the pre-emptor can lay his claim to property, which has been sold to another, must be strictly complied with and their performance established." The first ceremony, the *talab-i-mowasibat* or immediate demand, must be made immediately on receipt of the news of the sale. The next formality is the *talab-i-ishtishad*, or reiteration of the demand before witnesses, which must be made either on the premises or property sold or in the presence of the vendor or vendee. This ceremony must be performed within a reasonable time and without unnecessary delay after the first demand. The last act in the assertion of the right is the *talab-i-khusamat* or *talabi-i-tamlik*, that is to say, the making the claim in Court. In the present case the *talab-i-mowasibat* is said to have been performed by Mr. Lowis on the 13th August 1904, the *talab-i-istishad* on the 15th August 1904 and the present suit was instituted on the 10th March 1905.

It has been argued by the appellants that it is impossible to hold that any reasonable man in the place of Mr. Lowis would not have known by the 3rd August, from the telegrams and letters, which he had received from Mr. Irwin, Amirul Hussain, and Mr. Leslie, that the sale had then taken place, that Mr. Lowis ought then to have made enquiries at the Registration office, and on discovery that the deed of conveyance had been registered to have performed the *talab-i-mowasibat*. His delay in not performing that ceremony, till the 13th August, was fatal.

In support of the contention that there must be no delay in the assertion of the claim reliance has been placed on the cases of *Ram Churn* v. *Nurhur Mahton*(1), *Ali Muhammad* v. *Taj Muhammad*(2), *Bhairon Singh* v. *Lalman*(3), and *Muhammad Wilayat Ali Khan* v. *Abdul Rab*(4). In all of those cases however, it was distinctly found that there had been on the part of the claimant a delay in asserting his claim, after he had in fact heard of the sale. The decisions in the first three cases can have no application to the

(1) (1870) 18 W. R. 250.
(2) (1876) I. L. R. 1 All. 283.
(3) (1884) I. L. R. 7 All. 23.
(4) (1888) I. L. R. 11 All. 104.

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No. 1, Barkatunnessa Begum, to the defendants Nos. 2 to 11 Mr. Lowis took all the steps he then could to ascertain the value of the share with a view to arrange the purchase of it on behalf of the plaintiff. No further intimation of the sale was received by Mr. Lowis till the 13th August, when he received the letter from Mr. Leslie that the sale to Jadu Lal Sahu had been effected. In strict compliance with the provisions of the Mahomedan law Mr. Lowis performed the *talab-i-mowasibat* after reading the first paragraph of the letter announcing that the sale had taken place and without reading the rest of the letter. It appears that previously Mr. Lowis had with Mr. Leslie's assistance been studying the Mahomedan law relating to pre-emption in order to be able, in compliance with that law, to assert the claim of the plaintiff on her behalf to pre-emption.

The telegrams from Amirul Hussain furthermore disclosed only that negotiations for the sale were in progress and not that the sale had been effected. The sale was not completed till the 29th July after the receipt of the last telegram from Amirul Hussain, and indeed (see the evidence of Nabi Bukhsh, P. W. 7) the telegram from Mr. Lowis asserting the right of the Raj to pre-emption was in fact received by Amirul Hussain before the deed was registered on the 29th July.

In considering these arguments we have first to decide, whether under the Mahomedan law the duty was imposed on Mr. Lowis of making an enquiry, when he was informed that negotiations for the sale to Jadu Lal were going on, and whether his failure to do so is fatal to the claim in the present case. Next we have to determine whether it must be held that Mr. Lowis was aware of the sale before the 13th August, and whether the ceremony of the *talab-i-mowasibat* was performed by him in due time and in strict compliance with the provisions of the Mahomedan law.

We can find nothing in the authorities on Mahomedan law, to which we have been referred, to support the contention that Mr. Lowis was bound to make enquiry, when he heard that the negotiations were going on, and to ascertain whether they had resulted in an actual sale. From Hamilton's Hedaya, as edited by Grady, page 551, it seems clear that before the *shafee* can

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(1) (1870) 13 W. R. 451. (2) (1865) 2 W. R. 47.
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It is also clear from the authorities that under the Mahomedan law, before it can be held that the sale was complete, there must have been a cessation of the vendor's right in the property: see also the case of *Ladun* v. *Bhyro Ram* (1). An argument was raised before us whether in the present instance the sale could be held to have been completed before the deed was registered. The majority of the Judges of the Full Bench in the case of *Begam* v. *Muhammad Yakub* (2) have held that the sale must be held to have been actually made for the purpose of asserting the claim to pre-emption, when the sale was complete under the Mahomedan law. Under the Mahomedan law declaration and acceptance, absolutely expressed, are sufficient to render the sale binding. The present case, however, differs from that which was before the Full Bench of Allahabad High Court, as in this case the price was not paid and delivery of the property was not made before registration. It has been contended for the respondents that the right of the vendor cannot be held to have ceased in the property before the price was paid. Difficulties appear likely to arise in applying the principle that for the purposes of pre-emption it is necessary to apply the Mahomedan law relating to sale, but it seems to me that the real solution is to be found in determining in each case what was the intention of the parties. In the present case we think there can be no doubt that the vendor and vendee did not regard the sale as a complete sale, till the price had been paid and the deed registered.

The decision of this question is for the purposes of the present case of minor importance, as I hold on the evidence, which has been laid before us, that it is not proved that Mr. Lowis had *information*, which he believed, that a sale had been effected, till he received the letter from Mr. Leslie on the 13th August. I must hold, therefore, that there was not any delay on the part of Mr. Lowis in performing the *talab-i-mowasibat*, which would be fatal to the present case.

Rumours that a sale had been effected, even if they had come to Mr. Lowis' knowledge, would in themselves not have been a sufficient basis on which to perform the *talab-i-mowasibat*.

(1) (1867) 8 W. R. 255. (2) (1894) I. L. R. 16 All. 344.

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Another point taken is that, as the estate was under partition, an order must have been passed under section 29 of the Bengal Estates Partition Act, 1897, which would have the effect of dividing the shares of the proprietors so effectually as to destroy the right of pre-emption. This contention cannot, I think, be accepted. It appears to me that an order under section 29, supposing such an order to have been made, would make little or no difference to the position of proprietors, whose names, with the extent of their respective interests, are already registered in the Collector's books. The liability for the revenue, the land itself, and the tenants thereon remain joint, after an order is made under section 29, until the date specified in section 95 of the Act, and therefore it seems clear that, until the later date, the right of pre-emption subsists. See *Wahed Ali Khan* v. *Hunooman Pershad* (1). In the cases cited by the learned Advocate-General [*Gopal Sahi* v. *Ojoodheapershad* (2) and *Joolraj Singh* v. *Toolun Singh* (3)] the partition had been completed. In the latter case the different lots had been numbered, a fact which shows that the last stage had been reached.

The last question to be decided is, whether a manager under the Court of Wards can perform the ceremonies of pre-emption on behalf of an adult female ward of Court. The learned Advocate-General concedes that a guardian can and should perform these ceremonies for a minor or lunatic, but contends that a manager under the Court of Wards is not a guardian and that his powers are limited by Statute. It is urged that the powers of the Court are limited by section 14 of the Bengal Court of Wards Act, 1879, to the performance of what is requisite for the proper care and management of the ward's property; and that the powers of the manager are limited by sections 39 and 40 to the management of the property. It is further pointed out that section 50 provides that the Court, after providing for the objects mentioned in section 49, may purchase other landed property for the ward. One of the objects mentioned in section 49 is the improvement of the land and property of the ward; and it is argued, therefore, that the wording of section 50 shows that the purchase of other

(1) (1869) 12 W. R. 484. (2) (1865) 2 W. R. 47.
(3) (1870) 14 W. R. 476.

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BRETT J.

It is also clear from the authorities that under the Mahomedan law, before it can be held that the sale was complete, there must have been a cessation of the vendor's right in the property: see also the case of *Ladun* v. *Bhyro Ram* (1). An argument was raised before us whether in the present instance the sale could be held to have been completed before the deed was registered. The majority of the Judges of the Full Bench in the case of *Begam* v. *Muhammad Yakub* (2) have held that the sale must be held to have been actually made for the purpose of asserting the claim to pre-emption, when the sale was complete under the Mahomedan law. Under the Mahomedan law declaration and acceptance, absolutely expressed, are sufficient to render the sale binding. The present case, however, differs from that which was before the Full Bench of Allahabad High Court, as in this case the price was not paid and delivery of the property was not made before registration. It has been contended for the respondents that the right of the vendor cannot be held to have ceased in the property before the price was paid. Difficulties appear likely to arise in applying the principle that for the purposes of pre-emption it is necessary to apply the Mahomedan law relating to sale, but it seems to me that the real solution is to be found in determining in each case what was the intention of the parties. In the present case we think there can be no doubt that the vendor and vendee did not regard the sale as a complete sale, till the price had been paid and the deed registered.

The decision of this question is for the purposes of the present case of minor importance, as I hold on the evidence, which has been laid before us, that it is not proved that Mr. Lewis had information, which he believed, that a sale had been effected, till he received the letter from Mr. Leslie on the 13th August. I must hold, therefore, that there was not any delay on the part of Mr. Lewis in performing the *talab-i-mowasibat*, which would be fatal to the present case.

Rumours that a sale had been effected, even if they had [illegible] to Mr. Lewis' knowledge, would in themselves not have [illegible] sufficient basis on which to perform the *talab-i-mowasibat*.

(1) (1867) 8 W. R. 255.

(2) (1894) I. L. R. 16 All.

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COXE J.

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In Amir Ali's Mahomedan Law it is stated that the *talab-i-ishtishad* must be performed within a reasonable time and without any unnecessary delay after the *talab-i-mowasibat*, and in the case of *Jumeelun v. Lateef Hossein*(1) a Full Bench of this Court held that there was no fixed time within which the *talab-i-ishtishad* should be performed, and that it was a question of fact for the Court to determine whether it was done within due time.

In the present case Mr. Lowis had stated the grounds or excuse (*oozoor*) for the delay. These have been accepted as sufficient by the Subordinate Judge, who has held as a fact that the *talab-i-ishtishad* was performed within a reasonable time after the first ceremony. I do not attach importance to the argument that, because under the Mahomedan law, a Jew, who heard of a sale on the Sabbath and made no claim, was held to have forfeited his right of pre-emption, therefore Mr. Lowis forfeited the right on behalf of the plaintiff, because, for the reasons which he has given, he did not go to Motihari on the 14th August. His sole reason was not that the 14th August was a Sunday. He gave other reasons, which the Subordinate Judge has accepted as sufficient, and I see no reason to arrive at a different conclusion.

As regards the actual performance of the ceremony I am not prepared on the basis of the decision of the Allahabad Court, on which the appellant relies, to hold that the performance of the *talab-i-ishtishad* is for the information of the vendor or vendee, though no doubt its effect may be to give them information. The formality is insisted on with the object of getting evidence that the pre-emptor has really asserted his right (see Amir Ali's Mahomedan Law, page 606), and because evidence is wanted in order to establish proof before the Magistrate (Hedaya, p. 501). It may be that no witnesses are present at the time of the performance of the *talab-i-mowasibat*. The second ceremony is necessary to be performed in the presence of witnesses so that there may be proof that the claim has been made.

I do not think it necessary to discuss in detail the cases of *Chamroo Pasban v. Puhlwan Roy*,(2) *Ali Muhammad Khan v.*

(1) (1871) 16 W. R. F. B. 13. (2) (1871) 16 W. R. C. R. 3.

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If this view is correct, and the assertion of the claim of pre-emption can be regarded as coming within the management of the property, then the manager could make the claim himself and needed no sanction from the Court of Wards. The actual purchase might or might not need the Courts' subsequent sanction, but the performance of the ceremonies of *talab-i-mowasibat* and *talab-i-ishtishad* did not constitute a purchase and was within the powers of the manager himself.

If this view is not correct, it seems to me that the practice result would inevitably be to deprive adult wards of Court altogether of the power of pre-emption. When an estate is taken over by the Court, the ward ceases to have any concern 195 of landed property, and the sale of the interest of a co-share[r] the never come to his knowledge. And even if it did com[e] *cooman* knowledge, his ignorance of its effect on his own proper[ty] eneral make it impossible for him to decide whether he ought [or] *Sokun* not to claim a right of pre-emption. Again the Court o[f] case itself could not perform the ceremonies with the prompti[tude] t the this ancient law requires, and thus the right itself woul[d] by being entrusted to a high authority, which [ ] er the reasonably be expected to have full information alwa[ys] on on or to move without due deliberation. dvoca'e-

That there is nothing inconsistent with the [ ] rm these Mahomedan law in allowing a deputy to perform [ ] manager monies for persons, who are unable to perform them[ ] s powers selves, is indicated in *Abadi Begam* v. *Inam Begam* [ ] the Court *Muhammad Khan* v. *Muhammad Said Husain*(2), and [ ] rds Act, me that it would be against the spirit of the Mahome[dan] er care hold that adult wards of Court were to be deprived [ ] powers of pre-emption, because, in framing the various C[ ] he manage- Acts of India, the necessity of making specific pr[ ] section 50 case of pre-emption was overlooked. mentioned

In conclusion I desire to express my entire con[ ] the ward. learned colleague's reprobation of the treatmen[t] mprovement defendant in cross-examination [ ] our finding, th[ ] h respect to the hand-notes it will appear [ ] defe[ ]ase [ ] is a man with whom it is impossible to hav[e] mpathy. [ ] that fact

(1) (1877) I. L. R. 1 All. 521. (2) (1896) I. L. R. 18 All. 309.

position of her guardian or agent. The decisions in the cases of *Lal Bahadur Singh* v. *Durga Singh*(1) and *Umrao Singh* v. *Dalip Singh*(2) afford ample authority for the view that a guardian is competent to assert a right of pre-emption on behalf of a minor, and in Shama Charan Sircar's edition of Mahomedan Law, part II, page 448, section 767, it is laid down that the privilege of *shafee* is established in favour of persons, who are absent, imbecile, insane or under age, the guardians of all of whom should avail themselves of the right, provided the same be for the advantage of their wards (*Sirajya-il-Islam*, p. 419).

It has further been held that under the Mahomedan law the legal forms to be observed under that law by a person claiming a right of pre-emption may be performed on behalf of such person by an agent or manager of such person: see *Abadi Begam* v. *Inam Begam*(3), *Harihar Dat* v. *Sheo Prasad*(4), and *Munna Khan* v. *Chheda Singh*(5). It has also been argued for the respondents that under section 189 of the Contract Act Mr. Lowis had authority under the emergency to act for the plaintiff and to perform the necessary ceremonies.

For the appellants it has been argued that Mr. Lowis, as manager appointed under the Court of Wards, is restricted in the exercise of his powers as guardian or manager of the plaintiff by the provisions of the Court of Wards Act (Bengal Act IX of 1879), and that, from the sections 49 and 50 of that Act, it is clear that Mr. Lowis as manager could not claim on behalf of the plaintiff the right of pre-emption, as he could not have purchased on her behalf the property, which was sold by defendant No. 1, such a purchase not being an object to which under the law the funds of the estate could be applied under section 48 of the same Act.

The Court of Wards Act makes no provision for the claiming on behalf of a ward of the right of pre-emption, and we have to consider whether on account of that omission in the Act all persons, whose properties are under the management of the Court of Wards, must be held to have lost the power to exercise their right. It must be observed that section 14 of the Act, which

(1) (1891) I. L. R. 3 All. 437.
(2) (1901) I. L. R. 23 All. 129.
(3) (1877) I. L. R. 1 All. 521.
(4) (1884) I. L. R. 7 All. 41.
(5) (1906) I. L. R. 28 All. 601.

Before Mr. Justice Brett.

1908
May 14.

SARAT CHANDRA ROY CHOWDHRY
v.
JATINDRA NATH MUKERJEE.*

Sale-certificate—Transfer of title—Registration—Transfer of Property Act (IV of 1882) s. 54—Registration Act (III of 1877) s. 17 (o)—Fishery rights.

Sale-certificates, that are granted by the Collectors after sale of "B class" or surplus lands acquired by Government under the provisions of the Land Acquisition Act, are sufficient in themselves to validate the transfer of title from Government to the transferee without being registered.

Fishery rights in water on certain portions of the land transferred to the purchaser by the sale-certificates, cannot exist separate from that land.

SECOND APPEAL by Raja Sarat Chandra Roy Chowdhry and others, the defendants.

The plaintiff-respondent, Jatindra Nath Mukerjee, based his claim in these suits on the purchase made by his father, Abhoy Charan Mukerjee, of certain "B class" or surplus lands alleged to have been acquired under the Land Acquisition Act for the Eastern Bengal State Railway. The lands in suit were sold at auction by the Collector of Purnea in June, 1904, and were purchased by Abhoy Charan Mukerjee, who subsequently transferred them to his son, the plaintiff-respondent.

The plaintiff alleged that the Collector deputed an Amin to give Abhoy Charan possession of the land, which he had purchased, but the defendants-appellants prevented possession being given to Abhoy Charan. The plaintiff accordingly sued for possession and mesne profits.

The sale of "B class" lands was made by the Collector in accordance with the Rules framed by the Board of Revenue, and the sale certificates were issued to the transferee in accordance with those Rules, but not registered.

* Appeals from Appellate Decrees, Nos. 2022 of 1906 and 249 of 1907, against the decrees of J. C. Twidell, District Judge of Purneah, dated July 11, 1906, confirming the decree of S. S. Saadat Hossain, Munsiff of Katihar, dated Mar. 20, 1906.

behalf of the plaintiff her right of pre-emption. As a guardian on her behalf under the provisions of the Mahomedan law Mr. Lewis had not only authority, but it was his duty, to assert the claim, if in his opinion it was for the benefit of the plaintiff. That the assertion of the right was for her benefit has not been contested and admits of no doubt.

As regards the question whether the sale to the defendants 2 to 11 covered the whole of the share of defendant No. 1 in *tola* Begumpur, the *khewat*, Ext. 72, on which the Subordinate Judge relies to prove that it did not, differs as regards the share of the plaintiff from the entry in the Register D of the Collectorate, Ext. L. 30. In the former the share appears as 3 annas 1 pie 12 krants and in the latter as 1 anna 1 pie 1 krant 13 masants 6 dants. It is contended for the appellant that the former having been prepared by the survey authorities from information furnished by the manager of the Matihari Indigo Factory, to which factory the shares were then on lease, cannot be accepted as evidence of title in preference to the entry in Register D. It is also argued that the case found by the Subordinate Judge is not that set forward by either of the parties.

The difference between the entries in the Register and in the record-of-rights is difficult to reconcile, but the question does not call for determination, if on the materials before us we hold that the plaintiff is entitled under her right of pre-emption, which she claims, to a conveyance in her favour of the whole share, which was sold to defendant No. 2.

Lastly we have to consider whether the conclusions of the Subordinate Judge are correct as regards the actual price paid for the property, namely that it was Rs. 26,000 only and not Rs. 39,967. In arriving at that conclusion the Subordinate Judge has found that the four hand notes referred to in the deed of conveyance and the transactions, which they were produced to prove, were not genuine, that the transactions were bogus transactions, and that the handnotes were prepared to support them with the object of raising the ostensible price paid for the property with a view to defeat the right of pre-emption.

The 4 hand-notes have been produced before us and we have examined them carefully, and I agree entirely in the conclusion

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SARAT CHANDRA ROY CHOWDHRY v. JATINDRA NATH MUKERJEE.

Babu Mahendra Nath Roy (*Babu Atul Krishna Roy* with him), for the respondent in Second Appeal No. 2022 of 1906 and in Second Appeal No. 249 of 1907. Under the special provisions of s. 17, cl. (*o*) of the Registration Act, all sale-certificates granted by Civil or Revenue Officers are exempted from registration. See also Land Acquisition Manual, Ch. III, Rule 4, p. 77 and Rule 10, p. 78.

Moulvi Shamsul Huda, in reply. That section of the Registration Act refers only to certificates, which can be granted under statutory provisions. These lands were sold under no statutory provisions: the provisions of s. 17 of the Act have no application to sales of surplus lands.

As to our *jalkar* or fishery rights, the Courts below are wrong in holding that they passed along with the lands. They are quite distinct rights; and there was no award made by the Collector regarding those rights.

BRETT J. In support of appeals Nos. 2022 of 1906 and 249 of 1907, the common point, which has been taken, is that the sale-certificate granted by the Collector after the sale of the land to the present plaintiff's father in these two cases, was not sufficient in law to effect a valid transfer of the title in the land to the purchaser.

It has been argued that the provisions of section 54 of the Transfer of Property Act would apply to a sale of this description, and that it would be necessary after such a sale, in order to effect a valid transfer of title, either that a registered document should be executed or that the property should be delivered to the vendee.

It appears that in these two cases, as in the others, the sale was held at a public auction by the Collector and the purchase was made by the father of the present plaintiff at that sale. Afterwards an Amin was deputed by the Collector to make over possession of the property to the transferee, but when the Amin went to deliver possession he was obstructed by the defendants and was, therefore, unable to place the transferee in possession. The present appellants, the defendants, are the persons, who

ıold, therefore, that the findings of the Subordinate Judge rrect and I confirm his judgment and decree and dismiss ›peal with costs.

may observe that the suit appears to have been fought out lower Court with unnecessary bitterness, that the cross-nation of the witnesses in some instances was needlessly ıcted, and, in the case of the defendant No. 2, I consider here was a gross abuse of the privilege of cross-examina- questions having been asked and allowed which were irrelevant, and were clearly intended only to insult and the witness. I am the more surprised to have to notice as I *understand that the case was conducted* by counsel in ›wer Court.

he plaintiff-respondent is entitled to her costs Defendant 1 claims to be entitled to her own costs, but we do not, the circumstances, think she is entitled to any costs and that she do pay her own costs.

he appeal having been dismissed, the Rule fails and it is arged with costs.

OXE J. I agree that the appeal should be dismissed with The facts of the case have been fully set out by my learned ıgue and it is unnecessary to repeat them. The only point seems to me to present any real difficulty is, whether the ger under the Court of Wards can perform the ceremonies red for pre-emption on behalf of a Ward of Court; and on ther points raised in the case I have but little to say.

.s regards the question, whether the *talab-i-mowasibat* was rmed with sufficient promptitude, I am satisfied that Lowis had no information of the sale before the 13th August, that he performed the ceremony immediately on receipt of information. The telegrams certainly informed him of the tiations for the sale, but equally certainly they did not inform that a sale had been completed; for the very last of them with the words "Jadu may break off." Again there is ence that one Bishundeo told Mr. Lowis that there was a our in the *bazar* that a sale had been effected; and Hurgobind

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Doss.

1908
Feb. 25.

ANANDA GOPAL GOSSAIN
v.
NAFAR CHANDRA PAL CHOWDHRY.*

Appeal to Privy Council—Leave to appeal—Final decree—Bengal Tenancy Act (VIII of 1885) s. 167—Remand order, when can be regarded a final decree—Civil Procedure Code (Act XIV of 1882) s. 595.

Where the cardinal point in a suit was, whether notice under s. 167 of the Bengal Tenancy Act to annul certain encumbrances was properly served or not, an order of the High Court holding that the notice had been properly served and remanding the case to be tried out on the other issues, is a final decree and an appeal from the decree to the Privy Council would lie.

Rahimbhoy Habibbhoy v. *Turner*(1) and *Mazhar Hossein* v. *Bodha Bibi*(2) referred to.

Application for leave to appeal to the Privy Council.

Nafar Chandra Pal Chowdhry and another, the respondents in this application, purchased a *patni mahal* sold for its own arrears with power to annul all encumbrances, and brought a suit under s. 167 of the Bengal Tenancy Act for setting aside the *darpatni* right of defendants Nos. 1 to 4 on the allegation that the necessary notices had been duly served by the Collectorate on the defendants.

The Subordinate Judge of Nadia held that the suit was defective for non-joinder of parties, and that the plaintiffs had failed to prove service of notices under s. 167 of the Bengal Tenancy Act and dismissed the suit.

Against the said decree the plaintiffs appealed to the High Court, which, on the 28th August 1907, reversed the finding and decree of the learned Subordinate Judge, holding that the notices under s. 167 of the Bengal Tenancy Act were duly

* Application for leave to appeal to His Majesty in Council, No. 1 of 1908.

(1) (1890) I. L. R. 15 Bom. 155. (2) (1894) I. L. R. 17 All. 112.

There is no doubt that that office stands on the premises sold. The learned Advocate General objects that it is not a public place. But it is nowhere laid down that the object of the *talab-i-ishtishad* is to obtain publicity. And in connection with the *talab-i-mowasibat* it was impressed upon us that in dealing with these ceremonies of an archaic law, we were bound to see whether they were performed in strict accordance with the rules laid down, and not whether there was a reasonable compliance with the spirit and intention of the law. It seems to me that the same argument applies to the *talab-i-ishtishad,* and that, if that ceremony was performed where the rules of the law require, we need not go further and inquire, whether the place was sufficiently public to give the opposite party the notice that, from a modern point of view, might be regarded as reasonable. Still less need we enquire into this point, when it is proved that immediately afterwards another proceeding was held, which, though it may not have been strictly in accordance with the rules, at any rate ensured the fullest publicity.

I agree also that there can be no doubt of the fabrication of the hand-notes, and that the real consideration for the sale was Rs. 26,000. And I may point out in passing that the perpetration of this fraud leaves no doubt that the purchasers knew that the sale was subject to the law of pre-emption.

The question of the purchase of Begumpur does not appear to me to be of any importance. Either that portion of the property was sold to the Sahus or it was not. If it was not sold, no question arises. If it was so sold, it could not be sold again to the plaintiff, and accordingly the plaintiff's purchase was no purchase, and could not affect the right of pre-emption The rule of Mahomedan law, to which reference was made. in the Court below, can refer only to purchases by the would-be pre-emptor from the vendee; and not to purchases from the vendor. In this Court the argument that the purchase invalidated the right of pre-emption was abandoned; and as there is no prayer in the plaint for the recovery of Begumpur on the ground of the subsequent purchase, the question, whether it was so purchased or not, loses all its importance.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice; and Mr. Justice Doss.

1908
Feb. 25.

ANANDA GOPAL GOSSAIN
v.
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(1) (1890) I. L. R. 15 Bom. 155. (2) (1894) I. L. R. 17 All. 112.

property cannot be regarded as the improvement of the land and property of the ward. And, if it cannot be regarded as an improvement, still less can it be regarded as management of the ward's property.

Now it is certainly the case that the Court of Wards is concerned only with the management and improvement of the ward's property [*Dhanipal Das* v. *Maneshar Baksh Singh*(1)] and that the personal rights of an adult ward are not otherwise interfered with. But it seems to me there is a true distinction between the pre-emption of another share in an estate, in which the ward is already interested, and the purchase of other landed property as an investment of savings under section 50 of the Court of Wards Act. The main business of the management of a mofussil estate is the collection of rents; and, when these have to be collected from persons, who are the joint tenants of a proprietor and his co-sharers, it must be of the utmost importance to the proprietor, for the purpose of dealing with his own share, to have a voice in the introduction of new co-sharers. This is especially the case, when the estate is actually under partition, and all the difficulties and disputes that attend joint ownership are being brought up for decision and settlement. At such a time claiming a right, as attaching to the ward's share of the property, to prevent another share of the estate passing into the hand of alien money-lenders might, I think, reasonably be regarded as an act incidental to the management of the ward's property. That the Court, even though it is only entitled to manage the ward's property, can go beyond mere dealing with the rents and profits, cannot be denied. It can certainly pay his personal debts; and in *Beti Maharani* v. *The Collector of Etawah*(2) it was even held that the Court on behalf of the ward could admit liability on a simple bond debt that would otherwise have become barred by limitation. Certainly, if the making of such an admission can be regarded as part of the management of the wards' property, or as otherwise within the Courts' powers, I see no reason why the assertion of a claim of pre-emption, based on the ownership of the ward's property, cannot also be regarded in the same light.

(1) (1906) I. L. R. 28 All. 570. (2) (1894) I. L. R. 17 All. 198.

1908
Ananda Gopal Gossain v. Nafar Chandra Pal Chowdhry.
Maclean C. J.

I have said, the cardinal point in the case. If the view taken by the Subordinate Judge is correct, then there is an end of the suit, and the decree, therefore, was final, and the petitioner contends that this is a final decree, because, if notice was not properly served, the suit must fail, and the defendant is released from further liability. He says he is entitled to have that question decided by the Judicial Committee. I think his contention must prevail.

The case appears to me to be governed in principle by the judgments of the Judicial Committee in the case of *Muzhar Hossein* v. *Bodha Bibi*(1) and of *Rahimbhoy Habibbhoy* v. *Turner*(2). No question arises as to value and the decree, against which it is sought to appeal, is one of reversal.

I think therefore that a certificate must be granted.

Doss J. I agree.

Leave granted.

S. M.

(1) (1894) I. L. R. 17 All. 112. (2) (1890) I. L. R. 15 Bom. 155.

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(1) (1906) I. L. R. 28 All. 570. (2) (1894) I. L. R. 17 All. 198.

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Chatal. The river Daokoba, which was variously called Jamuna, Brahmaputrâ or Konai, by constantly shifting its course, wrought considerable changes at Manikdiar. In 1301 B.S., the river, suddenly shifting its main channel, left in a portion of the old bed, an arm or branch separated from the main channel by a long stretch of sand bank. In 1302 B.S, when a portion of the chur became fit for cultivation, a dispute arose between the plaintiff and the proprietor of the neighbouring estate, the defendant; this led to a proceeding under s. 145 of the Code of Criminal Procedure, which was decided against the plaintiff, and the defendant thus obtaining a footing encroached upon the land further west, and in consequence the suit was instituted.

Defendant *inter alia* pleaded that the suit was barred by limitation, that the plaintiff had no title to the lands in suit, as they appertained to Katma Krishnagar, a zemindary of the late Prasanna Kumar Tagore.

The Court of first instance, relying upon the *thakbust* and survey maps produced by the plaintiff, decreed the plaintiff's suit.

Against this decision the defendant appealed to the High Court.

Feb 14.

Mr. Caspersz, Mr. B. Gangoly, Babu Nilmadhub Bose, Babu Mukunda Nath Roy and *Babu D. N. Bagchi*, for the appellant

Mr. Hill and *Babu Jogesh Chunder Roy*, for the respondent.

Cur. adv. vult.

MITRA AND CASPERSZ JJ. We are now in a position finally to dispose of this appeal. The defendant having failed to make out his original case, that the land in controversy was a part of his village Katma Kristopore in parganah Patiladaha, put forth, by his amended written statement filed in this Court, a new case, viz., that the land was re-formation on the site of, and accretion to, a part of his village Chur Dulka in the same parganah. Copies of the survey map of Chur Dulka prepared in April, 1856, and the parganah map of Patiladaha, prepared in the same season,

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however, gives the breadth accurately. The *thâkbust* map, however, contains the following statement concerning the river-bed—"A twelve annas share appertains to this mouzah (Manikdiar). A four annas share appertains to mouzah Salmari (a village in parganah Jafarsahi)." This statement shows that three-fourths of the river-bed formed, or were supposed to form, a part of the village Manikdiar. The value of such a statement is not inconsiderable, notwithstanding that the Brahmaputra river is navigable. It is notorious that the course of the Brahmaputra is subject to constant changes and that its derelictions are very frequent. It could not be said, from the mere position of its current at any particular time within the memory of man, or within the last century, that the land covered by the river was not included within a permanently-settled estate. It is now not known where the course of the river exactly was, either at the time of the Decennial Settlement of 1790 or the Permanent Settlement of 1793. That its course underwent considerable changes since 1793 is now fairly established. Mr. Oldham, who was Superintendent of the Geological Survey of India, refers, in his book on the Geology of India, (p. 441), to the change of the course of this river, as also of the Ganges, the two great deltaic rivers of Bengal. Speaking of the modern changes in the delta as due to the upheaval of the elevated tract known as the Madhupur jungle, which had the effect of diverting the Brahmaputra eastward into the Sylhet *Jhils*, the learned author says:—"The result was that scarcely any sediment found its way to the sea by the Meghna, the great estuary of all the Sylhet rivers, and hence the sea face of the delta to the eastward curves back in the form of a gulf. The gap was much greater at the commencement of the present century (the nineteenth), but about that time the Brahmaputra having by the deposit of silt greatly raised the portion of the Sylhet *Jhils*, into which it flowed, changed its course completely in the course of a few years and, instead of flowing to the east of the Madhupur jungles, cut out a new channel to the west of the new tract. Since its change of course, the Brahmaputra has been brought much nearer to the main stream of the Ganges." The precise period of the avulsion, and its dereliction from east to west, cannot now be easily ascertained,

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of the appellant. The Amin, Banga Chandra Roy, who was deputed to make a local investigation, reported on the 5th June, 1872, that land measuring 2,104 bighas $7\frac{3}{4}$ cottahs, over and above the *thak* of Manikdiar, had been previously settled land, and that it was under water at the time of the thak measurement, and that for that reason a 12 annas portion of the river Daokoba had been allotted by guess to Manikdiar. The Settlement Officer accepted the report, and, on the 6th July, 1872, directed a release of the land claimed by the predecessor of the respondent, land which included a large part of the river-bed of 1852-53. It appears that, before the year 1872, the river had taken a different course, having solid land on the west of Manikdiar as well as of other villages, and that the Government allowed the claim of the plaintiff's predecessors to the abandoned bed of the river to the extent of three-fourths and did not take possession of it as khas mahal land. This was an abandonment of their claim by the Government and a recognition of the plaintiff's claim, and it is an effectual answer to the *jus tertii* set up by the appellant. In this proceeding for the ascertainment of khas mahal lands the predecessors of the appellant were also parties, and they had claimed a release of portions of the land originally measured as khas mahal land, but no part of the land released as land of Manikdiar was claimed by them. It appears that even up till then the claim of Manikdiar to three-fourths of the river-bed was undisputed.

Fresh submergence since 1872 and the recent appearance of the land resulted in a scramble for possession, and the success of the appellant in the proceeding under section 145 of the Code of Criminal Procedure has given rise to an unfounded contention as to the inaccuracy of the *thak* statement. The original claim of the respondent, based on a title to Katma Kristopore, failed and was, in fact, abandoned in this Court. The case now made, based on reformation *in situ* of Chur Dulka, is not only entirely new but it has also little foundation.

The survey of the district Rungpur took place in the season 1855-56. Chur Dulka was then an island chur in the same river Brahmaputra, and it was surveyed, not as Government property, which it would have been if the bed was not a part of a permanently-settled estate, but as a village in parganah Patiladaha

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COXE J.

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valuable evidence capable of being rebutted by other evidence on the record. The finding of the Court that had finally to deal with facts had been adverse to the appellant. *Jagadindra Nath Roy* v. *Secretary of State for India*(1) is not an authority for the proposition either that a survey map is insufficient evidence to establish title or that it is conclusive evidence of title. It is cogent evidence and may alone be the foundation of a decree declaring title, if the evidence afforded by it is not rebutted. It is for the Court dealing with facts to ascertain its probative force in each particular case.

Again, one of the matters, which may, and generally ought to be, taken into consideration, especially whenever there is, as in this case, a conflict between survey maps, is the amount of publicity with which the survey in each case was made and the entries were recorded, and the opportunity which the party denying its evidentiary value had in pointing out the correct boundaries of any particular village or estate. In *Syama Sunderi Dassya* v. *Jogobundhu Sootar* (2), the Court held that a *thakbust* survey map and maps prepared on a revenue survey were very good evidence in cases of boundary dispute, if, upon the face of the proceedings and the maps, it appears that the parties were present and practically admitted the boundaries. The weight to be attached to these documents must, therefore, be in direct ratio to the opportunities, which existed, of objecting to the demarcations made by the survey officers. If objections were made and disallowed, the maps would be the best evidence in cases of boundary disputes. If objection was made to one part of a boundary line, and not to another, an acquiescence in the latter must be presumed, and it would also afford cogent evidence of an admission of the correctness of the boundary or of the statement as to that part.

The question of the evidentiary value of statements and of the conduct of zemindars or their agents in the preparation of *thakbust* maps has been discussed in several cases, and it has been uniformly held that the statements of zemindars or their agents contained in *thakbust* maps may amount to admissions that the

(1) (1902) I. L. R. 30 Calc. 291; L. R. 30 I. A. 44.

(2) (1888) I. L. R. 16 Calc. 186.

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COXE J.

is no excuse for the cross-examining counsel in putting, or for the Subordinate Judge in permitting, questions, which they must have known to be improper and condemned by the provisions laid down in the Evidence Act for the protection of witnesses.

Appeal dismissed.

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of 1855-56 goes against the theory that the boundary line as laid in 1852-53 was correct, has no force, and it is clear to us that the later survey cannot prevail, for the reasons we have given, over the earlier survey made in 1852-53.

In the result, this appeal must fail. It is accordingly dismissed with costs.

Appeal dismissed.

S. C. G.

The defendants contended, *inter alia*, that the sale certificates, not being registered instruments, did not effect a valid transfer of title to the land in suit; that the water and fishery rights were never acquired by Government; and that the right of fishery was not an incumbrance within the meaning of s. 16 of the Land Acquisition Act, and, therefore, it could not be extinguished.

The Court of first instance decreed the suits for possession, including the *jalkars*, but disallowed the plaintiff's claim as regards mesne profits. The District Judge, on appeal, upheld the judgment of the first Court.

The defendants appealed to the High Court.

Babu Joy Gopal Ghosha, for the appellant in Second Appeal No. 2022 of 1906. The plaintiff has not proved his title to the lands. The sale-certificates granted by the Collector not being registered instruments are not admissible in evidence. The plaintiff has, therefore, no valid title to the lands.

Moulvi Shamsul Huda (Moulvi Mahomed Tahir with him), for the appellants in Second Appeal No. 249 of 1907. Under s. 54 of the Transfer of Property Act, the transfer of title to the lands in suits should have been by a registered instrument or by delivery of possession. The sale-certificates are not registered, nor was there any delivery of possession within the meaning of that section. The respondent has, therefore, no title to the lands: *Sibendrapada Banerjee* v. *Secretary of State for India* (1). Although these lands were sold to the highest bidder, the sale was a private one in the sense that the land in suit was sold as private property of Government and not under any Statute. [BRETT J. The sale took place under the Land Acquisition Act.] That Act provides for acquisition of lands, but does not provide for sale of surplus lands. Here the Collector, who sold the lands, acted as a private proprietor of the property, and therefore the sale-certificates should have been registered.

[BRETT J. The property did not vest in the Collector personally, and therefore he did not sell it as a private proprietor, but on behalf of the Government.]

(1) (1907) I. L. R. 34 Calc. 207, 209.

1908

KRISHNA PADA DUTT v. SECRETARY OF STATE FOR INDIA.

The District Judge of Hooghly upheld the contention of the objectors and rejected the petition.

The petitioner appealed to this Court.

Babu Dwarka Nath Mitra (*for Babu Golap Chandra Sastri*) and *Babu Pravash Chandra Mitra*, for the appellants. The Dayabhaga is absolutely silent on the point, whether the sister's daughter's son of a deceased person is an heir or not, and we must therefore refer to the Mitakshara for our guidance. In *Collector of Madura* v. *Mootoo Ramalinga Sathupathy*(1) the Judicial Committee held that the Mitakshara is received as of high authority yielding only to the Dayabhaga in points, where they differ. In *Moniram Kolita* v. *Keri Kolitani*(2), the Judicial Committee recognized the authority not only of the Mitakshara but also of Viramitrodaya in Bengal, and held that both treatises may be referred to in Bengal in cases where the Dayabhaga is silent. In *Umaid Bahadur* v. *Udoi Chand*(3) a Full Bench of this Court held that a sister's daughter's son is an heir under the Mitakshara law. As in the Dayabhaga there is nothing contrary to this, and it is silent on this point, he is an heir under the Dayabhaga school. Hindu law regards with extreme jealousy the right of the King to take on failure of heirs: *Gridhari Lall Roy* v. *The Bengal Government*(4). The word "heritage" as explained in Dayabhaga I, 3 shows that the Dayabhaga deals with the succession of *any relation* and is not restricted to relations conferring spiritual benefit. All the heirs must be exhausted before the Crown can come in. See Dayabhaga, Ch. XI., Sec. 1, p. 4. The list of heirs is not exhaustive: *Gridhari Lall Roy* v. *The Bengal Government*(4). Spiritual benefit is not the only guide to succession in the Bengal school. The theory may be resorted to for the purpose of determining the claims of competing claimants both claiming the benefit of the theory, but it certainly cannot be taken to be the guide in determining whether a person is in the line of heirs at all.

The Senior Government Pleader (*Babu Ram Charan Mitra*), for the Secretary of State. Mitakshara is different from Dayabhaga

(1) (1868) 12. M. I. A. 397, 435.
(2) (1879) I. L. R. 5 Calc. 776 (S.C.); L. R. 7 I. A. 115.
(3) (1880) I. L. R. 6 Calc. 119.
(4) (1868) 12 M. I. A. 448, 463.

obstructed the Officer of Government from delivering possession to the transferee; and even if the provisions of section 54 were applicable to the present case, in my opinion, it would not be open, in these suits, to the appellants to rely on their own wrongful acts as invalidating the transfer of the land to the plaintiff's father or preventing him from acquiring a valid title.

It appears, however, clear that the sale in both cases was made by the Collector in accordance with the Rules issued by the Board of Revenue and that, after the sale, the Collector, in accordance with these Rules, issued sale-certificates in proper form to the transferee. These certificates were in my opinion sufficient in themselves to transfer the title from Government to the transferee, and section 17, clause (*o*), of the Indian Registration Act is authority for the contention advanced by the learned vakil for the respondent that such certificates were sufficient to validate the transfer of title to the transferee without being registered.

This is the only point urged in support of this appeal(1) and, as I find that point fails, I dismiss the appeal with costs.

In this appeal (2) it is further contended that the defendants were in possession of the fishery rights in the water on certain portions of the land, the subject of this suit, and that those rights could not be transferred by the sale-certificate.

It seems, however, that the only pieces of water, in which these rights were claimed, were those collected in borrow-pits, and I am unable to hold that these rights could exist separate from the land or that they were such rights as would remain with the defendants after the transfer of the land to the purchaser.

No other point is raised in support of this appeal(2), and, as it fails, I dismiss the appeal with costs.

Appeal dismissed.

B. D. B.

(1) S. A. No. 2022 of 1906. (2) S. A. No. 249 of 1907.

1908

KRISHNA PADA DUTT v. SECRETARY OF STATE FOR INDIA.

MACLEAN C.J.

certificate to collect the debts due to the estate of one Ishan Chandra Mitra. The petitioners are

(1) the daughter of the sister of the deceased and

(2) the son of that daughter.

The Secretary of State opposed the petition on the ground that under the Dayabhaga school of Hindu law, by which the deceased Ishan Chandra Mitra was governed, the petitioners are not heirs at all. The brother of the wife of the deceased raised a similar objection. He raised another objection also to which, however, it is not necessary to refer.

The District Judge has rejected the application on the ground that, under the Dayabhaga law, the petitioners are not heirs, as they offer no funeral oblations to the ancestors of the deceased.

The petitioners have appealed. We agree with the learned District Judge in his conclusion. It is unquestionable that under the Dayabhaga a sister is not an heir. The father's daughter's son, *i. e.*, the sister's son is, by the author of the Dayabhaga, declared to be an heir on account of his competency to offer oblation to the father of the deceased, in which oblation, the latter participates (See Dayabhaga, Ch. XI, section 6, paragraph 9). The claim of the daughter of the sister, who offers no such oblations, cannot be placed upon a higher footing than that of the sister herself, and indeed such a claim has not been advanced before us at all.

But it has been contended that, as the sister's daughter's son has been held in the case of *Umaid Bahadur* v. *Udoi Chand*(1) to be an heir under the Mitakshara, he ought similarly to be held to be an heir under the Dayabhaga law, because, as has been further argued, wherever the Dayabhaga is silent, the law is to be taken from the Mitakshara; and in support of this latter contention reliance has been placed upon some observations of the Privy Council in the case of the *Collector of Madura* v. *Mootoo Ramalinga Sathupathy*(2) and that of *Moniram Kolita* v. *Keri Kolitani*(3).

We do not think that the passages cited bear out the broad proposition formulated before us nor have they any reference to any question of inheritance.

(1) (1880) I. L. R. 6 Calc. 119. (2) (1868) 12 M. I. A. 397.
(3) (1879) I. L. R. 5 Calc. 776; L. R. 7 I. A. 115.

served upon the defendants and remanded the case for addition of parties and retrial on its merits.

1908
ANANDA GOPAL GOSSAIN v. NAFAR CHANDRA PAL CHOWDHRY.

The heir of defendant No. 1, Rajabala Debi, applied for leave to appeal to His Majesty in Council against this decree of the High Court.

Babu Sarat Chandra Khan, for the petitioners. The real question in this suit is, whether the notices have been duly served on us, and it goes to the root of the matter. Leave in such cases has been granted: *Rahimbhoy Habibbhoy* v. *Turner*(1), *Saiyid Muzhar Hossein* v. *Bodha Bibi*(2). As the remand order decides this point, it is a final decree, against which I am entitled to appeal to the Privy Council.

Babu Khettramohan Sen (for *Babu Amarendranath Basu*), for the opposite party. A remand order cannot be final. The petitioner will be able to appeal to His Majesty, if necessary, when the case is finally decided here after retrial. This application is premature.

MACLEAN C. J. This is an application for a certificate that the case is a fit and proper one for appeal to His Majesty in Council.

The suit was one under section 167 of the Bengal Tenancy Act, and the object of it was to annul certain encumbrances by giving notice under section 167 of the Act.

The cardinal point in the suit was, whether the notice was properly served. The Subordinate Judge found that it was not, and dismissed the suit. This Court took an opposite view and held that the notice had been properly served and remanded the case to be tried out on the other issues. An application is now made for leave to appeal to His Majesty in Council from the decision of this Court, and the only question is, whether the order passed by this Court is a final decree within the meaning of section 595 of the Code of Civil Procedure. On the face it purports to be only an order of remand, but the question, whether the notice was properly served or not, is, as

(1) (1890) I. L. R. 15 Bom. 155. (2) (1894) I. L. R. 17 All. 112.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Doss.

1908
April 2.

JOGENDRA MOHAN SEN
v.
UMA NATH GUHA.*

Revenue Sale—Arrears of revenue—Kist—Payment, after last day of one kist and on the last day of the next kist—Appropriation—Implication from amount paid—Notice—Revenue Sale Law (Act XI of 1859) ss. 5, 13—Contract Act (IX of 1872) ss. 59, 60.

Where the revenue for the January *kist* of a *mahal* was not paid on the last day of payment and subsequently the Collector issued a notification under ss. 5 and 13 of Act XI of 1859 that, if arrears of revenue be not paid on or before the 28th of March ("the next latest day for payment of revenue") the *mahals* mentioned therein would be sold, and where the amount remitted by the defaulting proprietor and received by the Collector on the 28th of March was very much less than the revenue for the March *kist*, but somewhat in excess of the arrear in question.

Held, the payment was by implication intended for the January *kist* and should have been so appropriated by the Collector.

Held, further, that there being nothing specific on such a matter in Act XI of 1859, we must fall back upon the general law, which is practically the same as embodied in ss. 59 and 60 of the Contract Act.

Ganga Bishun Singh v. Mahomed Jan(1) not followed.

SECOND APPEAL by the plaintiffs.

A certain *taluk*, bearing *tauzi* No. 1877 in the Faridpur Collectorate, was sold for arrears of revenue amounting to Re. 1-6-11. The estate was purchased by the defendant No. 1, who alone contested the suit, and the plaintiffs sued to have the sale set aside, on the ground that, at the time of the sale, the estate was under attachment on account of a decree of the Civil Court and

* Appeal from Appellate Decree, No. 1393 of 1906, against the decree of W. S. Coutts, District Judge of Faridpur, dated June 18, 1906, affirming the decree of Kalidhan Chatterjee, Subordinate Judge of Faridpur, dated June 14 1901.

(1) (1906) I. L. R. 33 Calc. 1193.

served upon the defendants and remanded the case for addition of parties and retrial on its merits.

The heir of defendant No. 1, Rajabala Debi, applied for leave to appeal to His Majesty in Council against this decree of the High Court.

Babu Sarat Chandra Khan, for the petitioners. The real question in this suit is, whether the notices have been duly served on us, and it goes to the root of the matter. Leave in such cases has been granted: *Rahimbhoy Habibbhoy* v. *Turner*(1), *Saiyid Muzhar Hossein* v. *Bodha Bibi*(2). As the remand order decides this point, it is a final decree, against which I am entitled to appeal to the Privy Council.

Babu Khettramohan Sen (for *Babu Amarendranath Basu*), for the opposite party. A remand order cannot be final. The petitioner will be able to appeal to His Majesty, if necessary, when the case is finally decided here after retrial. This application is premature.

MACLEAN C. J. This is an application for a certificate that the case is a fit and proper one for appeal to His Majesty in Council.

The suit was one under section 167 of the Bengal Tenancy Act, and the object of it was to annul certain encumbrances by giving notice under section 167 of the Act.

The cardinal point in the suit was, whether the notice was properly served. The Subordinate Judge found that it was not, and dismissed the suit. This Court took an opposite view and held that the notice had been properly served and remanded the case to be tried out on the other issues. An application is now made for leave to appeal to His Majesty in Council from the decision of this Court, and the only question is, whether the order passed by this Court is a final decree within the meaning of section 595 of the Code of Civil Procedure. On the face it purports to be only an order of remand, but the question, whether the notice was properly served or not, is, as

(1) (1890) I. L. R. 15 Bom. 155. (2) (1894) I. L. R. 17 All. 112.

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into force and admittedly the present law is in favour of the zamindars. The sale is compulsory, whatever the amount of the arrear is. Section 18 is the only section which gives the discretion to the Collector to make an exception.

[MACLEAN C.J. See rule 6 of the Board. The Collector can exempt from sale and accept revenue after sunset of the last day. Here the question is whether there was an arrear or not. The Collector here invited him to pay the money on the 28th March.]

That notice was an error. As after the 28th the second arrear would occur, which he was aware of, he certainly sent more than one arrear. The conduct of the defaulter was not just. Why did he wait till the last day for such a small sum? The cases cited for the appellant are distinguishable. After the due date, the Collector was not bound to take. He might exercise his discretion as to the *kist* closed by the sunset of January 12. There is a legal obligation on the Collector to appropriate payments to the running *kist*. See *Sheikh Mohammed Aga* v. *Jadunandan Jha*(1). See also *Ganga Bishun Singh* v. *Mahomed Jan*(2) on the question whether the Contract Act applies.

Babu Mohinimohan Chakravarti in reply. The amount transmitted by money-order was nearer to the arrear for January *kist* than the amount due for the March *kist*. The principles of contract must apply to such cases.

MACLEAN C.J. The only question in this case is, whether there were any arrears of revenue due, which would justify the sale which has taken place. This is a second appeal, and we must accept the facts as found by the lower Appellate Court. The difficulty arose as to the non-payment of the January *kist* for the year 1899. The last day for the payment of that *kist* was the 12th of January and it was not paid. But on the 27th of February 1899, a notification was issued from the office of the Collector in these terms: "It is hereby notified under sections 5 and 13 of Act XI of 1859 that, if arrears of revenue mentioned below, be not paid on or before the 28th of March, *i.e.*, the next

(1) (1905) 10 C. W. N. 137.

(2) (1906) I. L. R. 33 Calc. 1193.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

DUNNE

v.

DHARANI KANTA LAHIRI.*

1908
Mar. 6.

Thakbust and Revenue Survey maps, evidentiary value of—Statement recorded in the presence of parties, effect of.

In a dispute, whether certain land belonged to the estate of the plaintiff or to that of the defendant, the plaintiff produced *thakbust* as also survey maps of the year 1852-53, the *thakbust* map contained a statement, which supported the plaintiff's case.

The predecessor of the appellant defendant had full notice of the *thak* proceedings, and he objected to the boundary line as laid between his and the plaintiff's estate, but the objection was disallowed.

The defendant produced a survey map of 1855-56 of the district, which contained his estate, in support of his case, but he did not produce any *thakbust* map of the same year, and there was no evidence to support the accuracy of the survey map —

Held, that the evidentiary value of the *thakbust* map, and the survey map produced on behalf of the plaintiff, was greater than that of the survey map produced on behalf of the defendant.

The cases of *Jagadindra Nath Roy* v. *Secretary of State for India*(1), *Syama Sunderi Dassya* v. *Jogobundhu Sootar*(2) and *Nobo Coomar Dass* v. *Gobind Chunder Roy*(3) referred to.

APPEAL by the defendant, Mr. A. M. Dunne, Receiver to the estate of the late Hon'ble Prasanna Kumar Tagore.

This appeal arose out of an action brought by the plaintiff to recover possession of certain chur lands with mesne profits. The plaintiff claimed the land partly as reformed lands of mouzah Manikdiar, belonging to the plaintiff, and partly as derelict land of river Daokoba, a twelve annas of which was measured by the Thâk authorities as appertaining to the said mouzah, and partly as the dried-up bed of a channel called

* Appeal from Original Decree, No. 239 of 1904, against the decree of A. N. Majumdar, Subordinate Judge of Mymensingh, dated Dec. 23, 1903.

(1) (1902) I. L. R. 30 Calc. 291; I. R. 30 I. A. 44.

(2) (1888) I. L. R. 16 Calc. 186.

(3) (1881) 9 C. L. R. 305.

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into force and admittedly the present law is in favour of the zamindars. The sale is compulsory, whatever the amount of the arrear is. Section 18 is the only section which gives the discretion to the Collector to make an exception.

[MACLEAN C.J. See rule 6 of the Board. The Collector can exempt from sale and accept revenue after sunset of the last day. Here the question is whether there was an arrear or not. The Collector here invited him to pay the money on the 28th March.]

That notice was an error. As after the 28th the second arrear would occur, which he was aware of, he certainly sent more than one arrear. The conduct of the defaulter was not just. Why did he wait till the last day for such a small sum? The cases cited for the appellant are distinguishable. After the due date, the Collector was not bound to take. He might exercise his discretion as to the *kist* closed by the sunset of January 12. There is a legal obligation on the Collector to appropriate payments to the running *kist*. See *Sheikh Mohammed Aga* v. *Jadunandan Jha*(1). See also *Ganga Bishun Singh* v. *Mahomed Jan*(2) on the question whether the Contract Act applies.

Babu Mohinimohan Chakravarti in reply. The amount transmitted by money-order was nearer to the arrear for January *kist* than the amount due for the March *kist*. The principles of contract must apply to such cases.

MACLEAN C.J. The only question in this case is, whether there were any arrears of revenue due, which would justify the sale which has taken place. This is a second appeal, and we must accept the facts as found by the lower Appellate Court. The difficulty arose as to the non-payment of the January *kist* for the year 1899. The last day for the payment of that *kist* was the 12th of January and it was not paid. But on the 27th of February 1899, a notification was issued from the office of the Collector in these terms: "It is hereby notified under sections 5 and 13 of Act XI of 1859 that, if arrears of revenue mentioned below, be not paid on or before the 28th of March, *i.e.*, the next

(1) (1905) 10 C. W. N. 137. (2) (1906) I. L. R. 33 Calc. 1193.

were relied on by the defendant in his amended written statement.

The Commissioners have now traced on the case-map the survey boundary lines of Chur Dulka, and it would appear therefrom that a portion of the land, possession of which has been decreed to the plaintiff, occupies the site of the southern part of Chur Dulka. The contention, therefore, of the defendant is, that this portion of the land should be excluded from the decree made by the lower Court, as, also, such land as adjoins it, on the ground of accretion. The plaintiff, however, bases his claim on the evidence afforded by the maps prepared by the survey authorities, about four years before the survey of the defendant's village took place, and these maps show that Chur Dulka either did not exist at the time they were prepared or had not then extended to the south beyond the line of boundary of the defendant's parganah Patiladaha, but was confined within that part of the river-bed which appertained to that parganah. The arguments addressed to us at the hearing have been confined to the relative weight to be attached to the maps filed by the parties. No other question has been argued before us.

A comparison of the *thakbust* and the survey maps leads to the indisputable inference that the part of the land in suit, which is covered by the site of the village Manikdiar of the plaintiff, as depicted in these maps, belongs to him, and he is entitled to a decree for possession of it in supersession of the order made against him in the proceeding under section 145 of the Code of Criminal Procedure, on the 25th June, 1898. The slight variation between the boundary lines of the thakbust and survey maps is not material. The variation between the western lines was evidently due to the recession of the river further towards the west during the time that elapsed between the preparation of the maps, the survey having followed the *thak* proceedings.

In the season 1852-53, the Brahmaputra river, which was then locally known as the *Daokoba*, and also the *Konai*, lay on the west of the village demarcated as Manikdiar. The *thakbust* map, as usual, does not give its breadth—lines being traced only to show its existence and not its breadth. The river survey map of the Daokoba prepared in the same season, 1852-53,

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We have been referred to a case of *Ganga Bishun Singh* v. *Mahomed Jan*(1), where it was held that sections 59 and 60 of the Indian Contract Act do not apply to transactions in relation to realization of land revenue. Speaking with great respect, I am doubtful as to the soundness of that decision. If these sections do not apply, what law does apply? There is nothing specific on the subject in Act XI of 1859. If sections 59 and 60 of the Contract Act do not apply, we must fall back upon the general law, and practically that law is embodied in these sections.

For these reasons, I think the appeal must succeed and the sale must be set aside.

The plaintiffs are entitled to their costs in all the Courts.

Doss, J. I agree.

Appeal decreed.

S. M.

(1) (1906) I. L. R. 33 Calc. 1193.

but it was undoubtedly in the beginning of the last century. Major Rennel's maps of the rivers of Bengal refer to a period antecedent to the Decennial Settlement. The Brahmaputra was then, after leaving the Assam Valley Districts, flowing in a bed that lay more to the east than now. The change occurred at a considerably later period. The subsequent shiftings of its bed during the last century were remarkable and also well known. It might be that a change had occurred only a few years before the *thakbust* map was prepared, and that the effect of the change had been to submerge a large portion of the village Manikdiar. The survey party in 1852-53 might have obtained satisfactory evidence of the fact, and recorded the river-bed to be private property and not property of the Government. We cannot hold, from the mere fact that the river was navigable, that the statement in the *thak* map is erroneous. The statement is good evidence against the appellant, who had evidently no title to put forward to the river-bed in this part of its course.

The *thakbust* surveyor (in 1852-53) of the locality in controversy was Raj Mohan Dutt, and the survey had been made with notice to all interested parties. That the predecessor of the appellant had full notice of the *thak* proceedings conducted by this amin, and that he was carefully watching his proceedings, is clear from the fact that he objected to the boundary line as laid between his parganah Patiladaha and parganah Jafarsahi at an adjacent place. The *Mutanaza* proceeding commenced by the appellant's predecessor for rectification of the boundary terminated, on the 30th March, 1853, by a verdict against him, and this verdict was affirmed in appeal in July, 1853.

In another proceeding for the settlement of a khas mahal, which took place in the year 1872, the parties were, amongst others, the predecessors of the parties to the present litigation. The predecessor of the respondent asserted in his petition, dated the 9th March, 1872, that at the time of the *thakbust* a large quantity of land of his village Manikdiar had been diluviated by the river, and he claimed a three-fourths share of the river-bed which had submerged his land. For this claim he relied on the statement in the *thakbust* map. The claim to three-fourths of the river-bed was not distinctly objected to by the predecessor

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from making payment of the sum to any person whomsoever. The Trustees were not parties to the rule and did not appear at its disposal.

No cause was shown by Gainsford and on the 25th June 1907, the order was made *ex parte* against Gainsford and it was further ordered *that the Trustees be prohibited* and restrained from making payment of the sum to Gainsford or to any other person.

This order was duly served on the Trustees by the Sheriff of Calcutta on the 11th July 1907, and thereupon the Trustees proceeded to make the present application.

It was contended by the Trustees in their petition that the Provident Fund was established under the provisions of section 73(*c*) of the Calcutta Municipal Act of 1899 for the benefit of the officers and servants of the Corporation and that rules were framed as empowered by that section for the regulation of that Fund. Rule 23 was as follows: "No subscriber shall be entitled to transfer or assign whether by way of security or otherwise, howsoever, his share or interest in the Fund, or any part thereof and no such transfer or assignment shall be valid, and the Managers, Trustees or General Committee shall not recognize or be bound by notice to them, respectively, of any such transfer or assignment and all moneys standing in the books of the fund to the credit of the subscriber so transferring his interest as aforesaid, shall forthwith be forfeited as from the date of such transfer or assignment, to the use of the fund, and be dealt with accordingly, and further, if any prohibitory order, or attachment, or process of a Civil Court be served upon the Managers, Trustees, General Committee or Corporation or any of them, or any person on their behalf, by which any moneys standing to the credit of any subscriber in the books of the fund shall be attached, or be ordered to be paid into a Civil Court, or be ordered to be withheld from such subscriber, such moneys shall forthwith be forfeited to the use of the fund, and be dealt with accordingly . . . . ."

They alleged that the defendant Gainsford as Secretary of the Corporation used to contribute to the Provident Fund under and subject to the Rules, until the 28th June 1907, when he resigned his appointment.

belonging to the then predecessors of the appellant. The southern part of Chur Dulka *stretches beyond the boundary line* between Patiladaha and Jafarsahi as shown in the maps of 1852-53. How it came to be treated in the later survey as land of Patiladaha, when the previous survey had included its site in Manikdiar, is not at all clear. The *thakbust* map of 1855-56 has not been produced, and there is no *thak* statement attached to Chur Dulka on the record. There is no evidence to support the accuracy of the survey map. The subsequent conduct of the predecessors of the appellant leads to a conclusion adverse to their claim as based on Chur Dulka. There is, also, no evidence of the possession of the southern part of Chur Dulka by the proprietors of Patiladaha. Chur Dulka was evidently an ephemeral island in the river-bed; it vanished from sight as well as from the *mind of man in a brief space of time* There is *nothing to show that Chur Dulka, as an independent village, is now recognized* as existing. It hardly admits of doubt that the revenue-survey of Chur Dulka was made in the absence of the predecessor of the respondent, or, at least, without sufficient notice, by a different survey party who, finding that the chur had extended to the south, included it as a part of the previously existing chur without a knowledge of the record that had been made in the season 1852-53. The non-production of the *thakbust* map and *thak*-statement makes such a theory highly probable. In *Jagadindra Nath Roy* v. *Secretary of State for India* (1), Lord Lindley, in delivering the judgment of the Judicial Committee, said: "Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made. They are not conclusive and may be shown to be wrong, but, in the absence of evidence to the contrary, they may be properly judicially received in evidence as correct when made." In that particular case their Lordships, while admitting the value of the survey map filed by the appellant, agreed with the Courts in India and declined to give effect to it against the Government, because it was, in their opinion, merely a piece of

(1) (1902) I. L. R. 30 Calc. 291; L. R. 30 I. A. 44.

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from making payment of the sum to any person whomsoever. The Trustees were not parties to the rule and did not appear at its disposal.

No cause was shown by Gainsford and on the 25th June 1907, the order was made *ex parte* against Gainsford and it was further ordered that the Trustees be prohibited and restrained from making payment of the sum to Gainsford or to any other person.

This order was duly served on the Trustees by the Sheriff of Calcutta on the 11th July 1907, and thereupon the Trustees proceeded to make the present application.

It was contended by the Trustees in their petition that the Provident Fund was established under the provisions of section 73(*c*) of the Calcutta Municipal Act of 1899 for the benefit of the officers and servants of the Corporation and that rules were framed as empowered by that section for the regulation of that Fund. Rule 23 was as follows: "No subscriber shall be entitled to transfer or assign whether by way of security or otherwise, howsoever, his share or interest in the Fund, or any part thereof and no such transfer or assignment shall be valid, and the Managers, Trustees or General Committee shall not recognize or be bound by notice to them, respectively, of any such transfer or assignment and all moneys standing in the books of the fund to the credit of the subscriber so transferring his interest as aforesaid, shall forthwith be forfeited as from the date of such transfer or assignment, to the use of the fund, and be dealt with accordingly, and further, if any prohibitory order, or attachment, or process of a Civil Court be served upon the Managers, Trustees, General Committee or Corporation or any of them, or any person on their behalf, by which any moneys standing to the credit of any subscriber in the books of the fund shall be attached, or be ordered to be paid into a Civil Court, or be ordered to be withheld from such subscriber, such moneys shall forthwith be forfeited to the use of the fund, and be dealt with accordingly . . . . ."

They alleged that the defendant Gainsford as Secretary of the Corporation used to contribute to the Provident Fund under and *subject to the Rules, until the 28th June 1907,* when he resigned his appointment.

land belonged to one village or the other. Such admissions must be greatly relied on in subsequent cases, as they were made at a time when there was no dispute regarding boundaries. This was the view taken by Jackson J. in *The Collector of Rajshahye* v. *Doorga Soonduree Debia*(1). In *Gunga Narain Chowdhry* v. *Radhika Mohun Roy*(2) the question as to the effect of the presence of the parties or their agents at an enquiry before an Amin, and the recognition of boundaries as laid down, was discussed, and it was held that such a recognition had great evidentiary value in subsequent disputes between the parties. In *Nobo Coomar Dass* v. *Gobind Chunder Roy*(3), Field J. reviewed the law and practice concerning revenue-surveys and came to the conclusion that the presence at the preparation of, and the signing by the parties or their agents of, a *thakbust* map might fairly be taken to be an admission by the parties of the boundary lines between adjoining villages. The same view, also, was taken by the same learned Judge in *Joytara Dassee* v. *Mahomed Mobaruck*(4), and by Maclean C. J. and Geidt J. in *Abdul Hamid Mian* v. *Kiran Chandra Roy*(5).

We are, therefore, of opinion that the evidentiary value of the *thakbust* map and the survey maps produced on behalf of the plaintiff is greater than that of the survey maps produced on behalf of the defendants. The line drawn as the boundary line between Patiladaha and Jafarsahi in the case map must, therefore, be taken to have been correctly laid as it appears in the survey map which was made in the season 1852-53. The lower Court has given very good reasons for holding that the land to the south of this line must be taken, to the extent of three-fourths of the river-bed, to appertain to the district of Mymensingh and to the plaintiff's village Manikdiar, and that the land to the north of that line must be considered to be the land of parganah Patiladaha belonging to the defendant. It is not necessary for us to enter in detail into the reasons given by the lower Court. We accept those reasons and come to the same conclusion. The argument addressed to us by Mr. Caspersz, that the survey map

(1) (1865) 2 W. R. 210.
(2) (1873) 21 W. R. 115.
(3) (1881) 9 C. L. R. 305.
(4) (1882) I. L. R. 8 Calc. 975.
(5) (1903) 7 C. W. N. 849.

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such moneys are forthwith forfeited to the use of the Fund. Thus the sum of Rs. 6,000 was forfeited.

Mr. B. C. Mitter, for the plaintiffs. The application was misconceived. The trustees should have instituted a separate suit to enforce whatever rights they laid claim to. *Mussamut Rambutty Kooer* v. *Kamessur Pershad*(1), and *Basavayya* v. *Syed Abbas Saheb* (2), were referred to. Further, there was nothing to show that the contributions made by Gainsford were "compulsory deposits" within the meaning of the Provident Funds Act, 1897, section 2.

Mr. Sinha, in reply. See the Full Bench case of *Chidambara Patter* v. *Ramasamy Patter* (3), dissenting from the decision in *Basavayya* v. *Syed Abbas Saheb*(2).

HARINGTON J. This is an application made on behalf of the Trustees of a Provident Fund, created by the Calcutta Municipal Corporation, for an order that it may be declared that a sum of Rs. 6,000 payable to one Gainsford is not liable to attachment.

It appears that an action was brought against Gainsford and another man, in which the plaintiff obtained an order calling upon Gainsford to show cause, why the sum of Rs. 6,000 payable to him out of the Municipal Provident Fund should not be attached. I gather from what has been stated in the arguments that no cause was in fact shown; the present trustees were not parties to the rule and did not appear and the order was made *ex parte* against Gainsford and the order prohibited the trustees from paying this sum of Rs. 6,000 either to Gainsford or to any other person; on receiving notice of that order the trustees come forward with the present application, the object of which is to remove that prohibitory order on the ground that the sum in question is not liable to be attached.

Mr. Sinha, who appears for the applicants, rests his contention on two grounds. The first is that by virtue of the Statute law deposits in the Calcutta Municipal Provident Fund cannot be attached, and secondly, that under the rules, under which this

(1) (1874) 22 W. R. (C. R.) 36. (2) (1900) I. L. R. 24 Mad. 20.
(3) (1903) I. L. R. 27 Mad. 67.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Doss.

KRISHNA PADA DUTT

v.

SECRETARY OF STATE FOR INDIA.*

1908 Feb 28.

Hindu Law—Dayabhaga—Succession—Succession Certificate—Sister's daughter—Sister's daughter's son—Spiritual efficacy, the criterion of inheritance—Succession Certificate Act (VII of 1889) s. 6.

Where the daughter of the sister of a deceased Hindu governed by the Dayabhaga school and her son applied under the Succession Certificate Act for a certificate to collect the debts due to the estate of the deceased,

Held (without expressing a final opinion) that competency to offer funeral oblations being the principal ground for succession under the Dayabhaga law, *primâ facie* a sister's daughter and a sister's daughter's son are not heirs, and as such are not entitled to have the certificate.

Umaid Bahadur v. *Udoi Chand*(1), *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(2) and *Moniram Kolita* v. *Keri Kolitani*(3), distinguished.

APPEAL by the petitioners, Krishna Pada Dutt and another, for grant of a Succession Certificate.

Ishan Chandra Mitra died in Falgun 1312 B. S, leaving him surviving Kusum Kumari, his sister's daughter, and Krishna Pada Dutt, her son, and no other near relatives. On the 23rd March 1906 Kusum Kumari and Krishna Pada applied for a certificate under the Succession Certificate Act for collection of debts due to the late Ishan Chandra Mitra. The brother-in-law (wife's brother) of the deceased Ishan Chandra Mitra and the Secretary of State for India in Council objected separately to the petition for the certificate being granted, mainly on the ground that the petitioners were not the heirs of the deceased under the Dayabhaga law.

* Appeal from Order, No. 83 of 1907, against the order of F. Roe, District Judge of Hooghly, dated Dec. 20, 1906.

(1) (1880) I. L. R. 6 Calc. 119. (2) (1868) 12 M. I. A. 397.

(3) (1879) I. L. R. 5 Calc. 776; L. R. 7 I. A. 115.

in fundamental principles of succession, and we cannot take advantage of the Mitakshara in such cases. The definition of *sapinda* is different in the two—Mayne, s. 9, 6th Ed., p. 7 and s. 500, p. 657. See also s. 502, p. 659, for definition of *bandhu*. Dayabhaga is not really silent. It is no doubt correct to say that we can refer to the Mitakshara, where the Dayabhaga is silent, but not in cases of inheritance. In Golap Chandra Sarkar's Hindu Law, 3rd Ed., p. 289, the author states his own opinion against the settled law. But he admits it is settled law that the fundamental principle of succession is the conferment of spiritual benefit. Jogendra Chandra Ghosh in his "Hindu Law," p. 33, also admits this to be settled law, though he regrets it. The law is now somewhat different from the texts.

Babu Brajalal Chakravarti for another respondent.

Babu Dwarka Nath Mitra in reply. The Crown also cannot claim as conferring a spiritual benefit.

[Doss J. But the sister's daughter's son is neither a *sagotra* nor a *samanodaka*.]

The doctrine of spiritual benefit should not be extended, but it should be restricted to the cases, to which it has been already extended.

[MACLEAN C.J. But we have only to decide whether you can take out a Succession Certificate.]

But if I am an heir, can I not get a certificate?

[MACLEAN C.J. It is no doubt heresy according to the English ideas that the Crown should step in so long as there are *any* relations. But we cannot go against settled law.]

[Doss J. Where would you place yourself?]

After the *samanodakas* and before the persons bearing the same family name. The clear intention of the Dayabhaga is to postpone the Crown to the very last. Mayne also says that spiritual benefit only decides the question of preference.

MACLEAN C. J. This appeal arises out of an application under the Succession Certificate Act (VII of 1889) for a

A sister's daughter's son has been held to be an heir under the Mitakshara law on the ground of community of corporal particles between him and the *propositus*. But if, competency to offer funeral oblations is, as indeed it has been declared by the author of the Dayabhaga, to be the principal ground for the succession of the father's daughter's son, *i.e.*, the sister's son, we fail to see how the son of the daughter of the sister can claim inclusion in the category of heirs upon any other ground. It is conceded that he does not offer any oblations to the ancestors of the *propositus*. Under the Dayabhaga law, a sister's son succeeds before the grandfather, and it is somewhat strange that her daughter's son should be postponed until after all the *samanodakas*, that is, after all the ascendants and the descendants up to the fourteenth generation, have been exhausted, and indeed no nearer position has been claimed on his behalf. No such anomaly arises under the Mitakshara, because under that law both the sister's son and the sister's daughter's son come in after the *samanodakas*.

We are of opinion, therefore, that *prima facie* a sister's daughter's son is not an heir under the Dayabhaga law. Moreover, the entire absence of any decided case directly in point affirming the right now set up on behalf of the sister's daughter and sister's daughter's son, despite the fact that they are such near relations, is very significant and tells strongly against the validity of such a claim.

Having regard to the summary character of the present proceedings, we refrain from expressing a final opinion on the question. All that we need say at present is that we are not satisfied by the arguments that have been advanced before us, that they are heirs under the Dayabhaga law. They are, therefore, not entitled to the certificate they have asked for.

For these reasons the appeal must be dismissed with costs.

DOSS J. I agree.

Appeal dismissed.

S. M.

that the notices as required by s. 5 of Act XI of 1859 were not duly served. The plaintiffs also contended that there were no arrears at the time of the sale. The suit was dismissed, and on appeal to the District Judge the appeal was dismissed on the ground that at the time of the sale the estate was not really under attachment and consequently the plaintiffs were not entitled to claim the protection of s. 6, Act XI of 1859.

On appeal to the High Court, the case was sent back for rehearing on the other points of fact and law raised in the suit.

The District Judge found against the plaintiffs on all these points and concluded his judgment in these words:—

"I find then on the whole that, although there was no attachment subsisting at the time of the sale, the Collector acted as if there were such attachment, he issued the necessary notices, etc., under s. 5 and complied with the provisions of s. 6. There were also arrears at the time of sale to justify the sale and there was no inadequacy of price. Placing the plaintiffs then in the most favourable position, viz., that there was a subsisting attachment at the time of sale, their suit cannot succeed, because all necessary action under ss 5 and 6 was taken. Their real position is, however, not so favourable as this, because I find, as a matter of fact, that there was no subsisting attachment."

From this decision the plaintiffs again appealed.

Hon'ble Dr. Rash Behary Ghose (*Babu Mohinimohun Chakravarti* with him), for the appellants. The Collector had no right to appropriate the payment for the March *kist*, though the money order was received by him on the 28th March, which happened to be the last day of payment of the March *kist*. It was meant to be paid for the arrears of January. Unless the Collector was justified in appropriating the payment to the March *kist*, there was no arrear. See *Balkishen Das* v. *Simpson*(1). This Privy Council case was followed in *Hamid Hossein* v. *Mukhdum Reza*(2). We must fall back upon the law of contract here. See Contract Act, ss. 59 and 60 and Leake on Contract, 4th Ed., p. 648. In such cases the English and Indian law is the same.

Babu Nilmadhab Bosu (*Dr. Priyanath Sen* with him), for the respondent. It is too late now to speak of stringency of law. The law was more stringent before Act XI of 1859 came

(1) (1898) I. L. R. 25 Calc. 833; L. R. 25 I. A. 151.
(2) (1904) I. L. R. 32 Calc. 329.

latest day, for payment of revenue, the under-mentioned *mahals* or share or shares thereof lying within District Faridpur shall be sold by auction for the said arrears in the office of the Collector of the said district at 11 A.M. of the next sale day." The Judge in the Court below finds that that notification was issued—the arrear was a very petty sum of Re. 1-6-11 pies—some two or three days before the 28th of March. The present appellants, the plaintiffs, who are seeking to set aside the sale, remitted a sum Rs. 3-7 annas to the Collector, and the Collector received it on the 28th March. He appropriated that sum of Rs. 3 7 annas to the payment of the March *kist*, the last day for the payment of which was also the 28th of March, and not to the payment of the small arrear of the January *kist*. The question turns upon whether this payment of Rs. 3-7 annas ought to have been appropriated to the January *kist*, which was in arrear or to the March *kist*: if to the former, there would have been no arrear to justify the sale. The plaintiff, when remitting the money, did not expressly intimate that the payment was to be applied to the discharge of the January *kist*. Then the question arises, whether the circumstances imply that the payment was to be applied to the discharge of the arrears of the January *kist*. I think the circumstances raise such implication. The fact of the above notice having been sent and having been received telling the plaintiffs that, unless they pay the arrears on or before the 28th of March the property would be sold, the fact that they paid it so that it was received on that day, and with the object of its being received on that day, implies that the plaintiffs intended the payment to be treated as made in respect of the January *kist*. No intimation or notice had been given to them about the March *kist*. The March *kist* amounted to about Rs. 9, so that the amount sent was substantially below the amount of that *kist* and was a little in excess of the small arrears of the January *kist*. The probabilities appear to be greatly in favour of the view that the payment was made in respect of the January *kist*, and it ought to be treated as paid in respect of that *kist*. In that view the money was in the coffer of the Collector on the 28th March, the last day for payment, and there was consequently no default, which would warrant a sale.

	Rs.	A.	P.	
The Bombay Code, Vol. I, Edition, 1907, containing the unrepealed Bombay Regulations and the Local Acts of the Governor-General in Council and the Regulations made under the Statute 33 Vict., Cap. 3, in force in Bombay	4	0	0	[8a.]

In the Press.

The Bombay Code, A Digest of Indian Law Cases, 1905 and 1906, by C. E. Grey Barrister-at-Law.

II.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL. AS MODIFIED BY SUBSEQUENT LEGISLATION.

	Rs.	A.	P.	
Act I of 1846 (Legal Practitioners), as modified up to 1st October, 1907	0	2	0	[1a.]
Act XVIII of 1850 (Judicial Officers' Protection), with footnotes	0	1	9	[1a.]
Act XX of 1853 (Legal Practitioners), as modified up to 1st September, 1907	0	1	9	[1a.]
Act XI of 1859 (Bengal Land Revenue Sales), as modified up to 1st August, 1906	0	4	0	[1a.]
Act III of 1864 (Foreigners), as modified up to 1st September, 1906	0	3	6	[1a.]
Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 1907	0	0	0	[a.]
*Act I of 1871 (Cattle Trespass), as modified up to 1st May, 1906	0	6	0	[1a.]
Act I of 1872 (Evidence), as modified up to 1st September, 1906	1	0	0	[2a.]
Act III of 1872 (Special Marriages), as modified up to 1st November, 1906	0	4	6	[6a.]
Act IX of 1875 (Indian Majority), as modified up to 1st May, 1906	0	2	0	[1a.]
Act XI of 1876 (Presidency Banks), as modified up to 1st March, 1907	0	11	0	[2a.]
Act I of 1878 (Opium), as modified up to 1st October, 1907 ...	0	0	0	[a.]
Act VI of 1882 (Companies), as modified up to 1st August, 1906	1	10	0	[8a.]
Act XV of 1882 (Presidency Small Cause Court), as modified up to 1st June, 1906	0	10	0	[2a.]
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906	2	6	0	[1a.]
Act VIII of 1894 (Tariff), as modified up to 1st February, 1906 ...	0	9	0	[2a.]
Act XII of 1896 (Excise), as modified up to 1st March, 1907 ...	0	8	0	[2a.]
Act II of 1899 (Stamps), as modified up to 1st March, 1907 ...	1	0	0	[2a.]

III.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor-General of India in Council from 1905 up to date.

Regulations made under the Statute 33 Vict., Cap. 3, from 1905 up to date.

[The above may be obtained separately. The price is noted on each.]

latest day, for payment of revenue, the under-mentioned *mahals* or share or shares thereof lying within District Faridpur shall be sold by auction for the said arrears in the office of the Collector of the said district at 11 A.M. of the next sale day." The Judge in the Court below finds that that notification was issued—the arrear was a very petty sum of Re. 1-6-11 pies—some two or three days before the 28th of March. The present appellants, the plaintiffs, who are seeking to set aside the sale, remitted a sum Rs. 3-7 annas to the Collector, and the Collector received it on the 28th March. He appropriated that sum of Rs. 3 7 annas to the payment of the March *kist*, the last day for the payment of which was also the 28th of March, and not to the payment of the small arrear of the January *kist*. The question turns upon whether this payment of Rs. 3-7 annas ought to have been appropriated to the January *kist*, which was in arrear or to the March *kist*: if to the former, there would have been no arrear to justify the sale. The plaintiff, when remitting the money, did not expressly intimate that the payment was to be applied to the discharge of the January *kist*. Then the question arises, whether the circumstances imply that the payment was to be applied to the discharge of the arrears of the January *kist*. I think the circumstances raise such implication. The fact of the above notice having been sent and having been received telling the plaintiffs that, unless they pay the arrears on or before the 28th of March the property would be sold, the fact that they paid it so that it was received on that day, and with the object of its being received on that day, implies that the plaintiffs intended the payment to be treated as made in respect of the January *kist*. No intimation or notice had been given to them about the March *kist*. The March *kist* amounted to about Rs. 9, so that the amount sent was substantially below the amount of that *kist* and was a little in excess of the small arrears of the January *kist*. The probabilities appear to be greatly in favour of the view that the payment was made in respect of the January *kist*, and it ought to be treated as paid in respect of that *kist*. In that view the money was in the coffer of the Collector on the 28th March, the last day for payment, and there was consequently no default, which would warrant a sale.

ORIGINAL CIVIL.

Before Mr. Justice Harington.

SETH MANNA LAL PARRUCK

v.

GAINSFORD.*

1908
Mar. 3.

Attachment—Provident Fund of Corporation of Calcutta—Subscriptions—Calcutta Municipal Act (Bengal Act III of 1889) sec. 73(c)—Provident Funds Act (IX of 1897) secs. 2(4), 4, 6—Provident Funds (Amendment) Act (IV of 1903) sec. 2—"Compulsory deposits"—Trustees.

The Provident Fund established by the Municipal Corporation of Calcutta is governed by the provisions of the Provident Funds Act of 1897 and the Provident Funds (Amendment) Act of 1903.

These Acts render any subscriptions to the Fund in the hands of the Trustees of the Fund not liable to attachment.

THIS was an application on behalf of the Trustees of the Provident Fund of the Corporation of Calcutta created under the Calcutta Municipal Act for a declaration that the sum of Rs. 6,000 to the credit of the defendant Gainsford in the Fund, was not liable to attachment, and for an order that a previous order of June 25th 1907, directing such attachment, be vacated or modified.

On the 9th January 1907 this suit was instituted by the plaintiff against the defendant Gainsford, who was the Secretary of the Corporation of Calcutta and another, for the recovery of the sum of Rs. 3,513 and interest due on their joint and several promissory note dated December 14th, 1905.

A rule was obtained by the plaintiff calling upon Gainsford to show cause, why he should not furnish security to satisfy any decree that might be passed against him in the suit and why in default thereof the sum of Rs. 6,000 payable to him out of the Provident Fund created under section 73(c) of the Calcutta Municipal Act should not be attached, until the final determination of the suit, and it was further ordered, that until such cause be shown, the Trustees of the Fund be prohibited and restrained

* Original Civil Suit No. 14 of 1907.

	Rs.	A.	P.	
The Baluchistan Code. Edition, 1900, containing the local enactments in force in British Baluchistan and the Agency territories, with Chronological Tables and an Index	5	0	0	[10s.]
The Burma Code, Edition, 1899	5	0	0	[9a.]
The Coorg Code, Edition, 1898	2	0	0	[6a.]
The Bombay Code, Vol. II, Edition, 1896, containing the unrepealed Acts of the Governor of Bombay in Council up to the end of the year 1880	5	0	0	[10s.]
The Bombay Code, Vol. III, Edition, 1896, containing the unrepealed Acts of the Governor of Bombay in Council from 1881 to 1895 ...	6	0	0	[12a.]
The Madras Code, Vols. I and II. Edition, 1902	12	0	0	[Re. 1.]
The Punjab and North-West Code, Edition, 1903, consisting of the unrepealed enactments locally in force in the Punjab and the North-West Frontier Province, with appendix and index ...	6	0	0	[10a.]

II.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL, AS MODIFIED BY SUBSEQUENT LEGISLATION.

	Rs.	A.	P.	
Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893 (with footnotes brought down to 1st December, 1901)	0	7	0	[1a.]
Act XX of 1847 (Copyright), as modified up to 1st December, 1903	0	5	0	[1a.]
Act XIX Of 1850 (Apprentices), as modified up to 1st May 1905	0	3	6	[1a.]
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	0	2	6	[1a.]
Act VIII of 1851 (Tolls on Roads and Bridges), as modified up to 1st June, 1897	0	2	6	[1a.]
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	0	2	0	[1a.]
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904	0	1	0	[1a.]
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903	0	2	0	[1a.]
Act XXVIII of 1855 (Usury Laws Repeal), as modified up to 1st December, 1903	0	1	6	[1a.]
Act XX of 1856 (Police Chaukidars), as modified up to 1st November, 1903	0	7	0	[1a.]
Act IV of 1857 (Tobacco, Bombay Town), as modified up to 1st August, 1895	0	3	9	[1a.]
Act XXIX of 1857 (Land Customs Bombay), as modified up to 1st December, 1895	0	4	0	[1a.]
Act III of 1858 (State Prisoners), as modified up to 1st August, 1897	0	2	0	[1a.]
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903	0	4	3	[1a.]
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903	0	2	3	[1a.]
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	0	5	0	[1a.]

It was also contended that in exercise of the powers vested in the Government of India under section 6 of the Provident Funds Act, 1897, the Government by a notification, dated the 8th July 1902 and duly published in the *Gazette of India* on the 12th July 1902, extended the provisions of the Provident Funds Act, 1897, to the Provident Fund of the Corporation of Calcutta.

Section 4 of the Provident Funds Act, 1897 is as follows: "After the commencement of this Act, the compulsory deposits in any Government or Railway Provident Fund shall not be liable to attachment under any decree or order of a Court of Justice in respect of any debt or liability incurred by a subscriber to, or depositor in, such Fund, and neither the Official Assignee, nor a Receiver appointed under Chapter XX of the Code of Civil Procedure, shall be entitled to, or have any claim on any such compulsory deposit."

The Trustees submitted that, as well by rule 23 set out above as by Section 4 of the Provident Funds Act, 1897, the sum of Rs. 6,000 to the credit of Gainsford in the Provident Fund of the Corporation of Calcutta, was exempt from attachment.

It is to be observed that section 2 of the Provident Funds (Amendment) Act, 1903, reproduces *verbatim* the provisions of section 4 of the Act of 1897 adding two sub-sections, which do not affect the present application.

Mr. Sinha for the Trustees. By section 4 of the Provident Funds Act, 1897 and section 2 of the Provident Funds (Amendment) Act, 1903, both of which Acts govern the Provident Fund of the Corporation of Calcutta, compulsory deposits in that Fund are rendered not liable to attachment. The definition of "compulsory deposits" in section 2 of the Act of 1897, covers such contributions as Gainsford's. See *Veerchand Nowla* v. *B. B. & C. I. Railway Company*(1). Further under rule 23 of the Rules and Regulations framed by the Calcutta Corporation under the power granted by section 73(*c*) of the Calcutta Municipal Act, 1899, on any order of attachment being served on the Trustees in respect of any moneys standing to the credit of any subscriber,

(1) (1904) I. L. R. 29 Bom. 259.

	Rs. A. P.	
Regulation VI of 1886 (Ajmer Rural Boards), as modified up to 1st February, 1897	0 5 6	[1a.]
Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1891	0 5 0	[1a.]
Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899	0 4 9	[1a.]
Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902	0 6 0	[1a.]

III.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor-General of India in Council from 1854 to 1904.

Regulations made under the Statute 33 Vict., Cap. 3, from No. II of 1875 to 1904. 8vo, stitched.

[The above may be obtained separately. The price is noted on each.]

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

		Rs. A. P.	
Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893, with footnotes brought down to 1st December, 1901 ...	In Urdu ...	0 2 6	[1a.]
Act XX of 1847 (Copyright), as modified up to 1st May, 1896	In Urdu ...	0 1 3	[1a.]
	„ Nagri ...	0 1 3	[1a.]
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	In Urdu ...	0 0 6	[1a.]
	„ Nagri ...	0 0 6	[1a.]
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	In Urdu ...	0 0 6	[1a.]
	„ Nagri ...	0 0 6	[1a.]
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904 ...	In Urdu ...	0 0 3	[1a.]
	„ Nagri ...	0 0 3	[1a.]
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903	In Urdu ...	0 0 6	[1a.]
	„ Nagri ...	0 0 6	[1a.]
Act XX of 1856, as modified up to 1st November, 1903...	In Urdu ...	0 2 6	[1a.]
	„ Nagri ...	0 2 6	[1a.]
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903 ...	In Urdu ...	0 1 0	[1a.]
	„ Nagri ...	0 1 0	[1a.]
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903 ...	In Urdu ...	0 1 0	[1a.]
	„ Nagri ...	0 1 0	[1a.]
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	In Urdu ...	0 1 6	[1a.]
Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874 ...	In Urdu ...	0 0 3	[1a.]
	„ Nagri ...	0 0 3	[1a.]
Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December, 1904	In Urdu ...	0 0 3	[1a.]
	„ Nagri ...	0 0 3	[1a.]
Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903	In Urdu ...	1 5 0	[5a.]
	„ Nagri ...	1 5 0	[5a.]
Act V of 1861 (Police), as modified up to 7th March, 1903	In Urdu ...	0 2 9	[1a.]
	„ Nagri ...	0 2 9	[1a.]

It was also contended that in exercise of the powers vested in the Government of India under section 6 of the Provident Funds Act, 1897, the Government by a notification, dated the 8th July 1902 and duly published in the *Gazette of India* on the 12th July 1902, extended the provisions of the Provident Funds Act, 1897, to the Provident Fund of the Corporation of Calcutta.

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The Trustees submitted that, as well by rule 23 set out above as by Section 4 of the Provident Funds Act, 1897, the sum of Rs. 6,000 to the credit of Gainsford in the Provident Fund of the Corporation of Calcutta, was exempt from attachment.

It is to be observed that section 2 of the Provident Funds (Amendment) Act, 1903, reproduces *verbatim* the provisions of section 4 of the Act of 1897 adding two sub-sections, which do not affect the present application.

Mr. Sinha for the Trustees. By section 4 of the Provident Funds Act, 1897 and section 2 of the Provident Funds (Amendment) Act, 1903, both of which Acts govern the Provident Fund of the Corporation of Calcutta, compulsory deposits in that Fund are rendered not liable to attachment. The definition of "compulsory deposits" in section 2 of the Act of 1897, covers such contributions as Gainsford's. See *Veerchand Nowla* v. *B. B. & C. I. Railway Company*(1). Further under rule 23 of the Rules and Regulations framed by the Calcutta Corporation under the power granted by section 73(*c*) of the Calcutta Municipal Act, 1899, on any order of attachment being served on the Trustees in respect of any moneys standing to the credit of any subscriber,

(1) (1904) I. L. R. 29 Bom 259.

Act	Edition	Rs.	A.	P.	
Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November, 1898	In Urdu ...	0	9	0	[1a. 6p.]
	„ Nagri ...	0	9	0	[1a. 6p.]
Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1900 ...	In Urdu ...	0	6	9	[2a.]
	„ Nagri ...	0	6	9	[2a.]
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899 ...	In Urdu ...	1	4	0	[6a.]
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902 ...	In Urdu ...	0	4	9	[1a. 6p.]
	„ Nagri ...	0	4	6	[1a. 6p.]
Act IV of 1884 (Explosives), as modified up to 1st May, 1896 ...	In Urdu ...	0	1	3	[1a.]
	„ Nagri ...	0	1	3	[1a.]
Act VI of 1884 (Inland Steam-Vessels), as modified up to 1st July, 1891 ...	In Urdu ...	0	9	0	[2a.]
	„ Nagri ...	0	9	0	[2a.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899 ...	In Urdu ...	0	2	6	[1a.]
Act II of 1885 (Negotiable Instruments Amendment) ...	In Urdu ...	0	0	9	[1a.]
Act III of 1885 (Transfer of Property Amendment) ...	In Urdu ...	0	0	3	[1a.]
Act X of 1885 (Oudh Estates Amendment)	In Urdu ...	0	0	3	[1a.]
Act XIII of 1885 (Telegraph), as modified up to 1st March, 1905 ...	In Urdu ...	0	1	6	[1a.]
Act XXI of 1885 (Madras Civil Courts Amendment) ...	In Urdu ...	0	0	3	[1a.]
Act II of 1886 (Income-tax), as modified up to 1st April, 1903 ...	In Urdu ...	0	8	0	[1a. 9p.]
	„ Nagri ...	0	8	0	[1a. 9p.]
Act IV of 1886 (Amending Section 265 of Contract Act) ...	In Urdu ...	0	0	3	[1a.]
Act VI of 1886 (Births, Deaths and Marriage Registration) ...	In Urdu ...	0	1	3	[1a.]
Act VII of 1886 (Registration Amendments)	In Urdu ...	0	0	3	[1a.]
Act X of 1886 (Criminal Law Amendment)	*In Urdu* ...	0	0	9	[1a.]
Act XI of 1886 (Tramways), as modified up to 31st December, 1900 ...	In Urdu ...	0	3	3	[1a.]
	„ Nagri ...	0	3	3	[1a.]
Act XIII of 1886 (Securities) as amended by the Repealing and Amending Act, 1891 ...	In Urdu ...	0	0	9	[1a.]
	„ Nagri ...	0	0	9	[1a.]
Act VI of 1887 (Companies Amendment)	In Urdu ...	0	0	3	[1a.]
Act VII of 1887 (Suits Valuation) ..	In Urdu ...	0	0	9	[1a.]
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896 ...	In Urdu ...	0	2	3	[1a.]
	„ Nagri ...	0	2	6	[1a.]
Act X of 1887 (Native Passenger Ships) ...	In Urdu ...	0	1	6	[1a.]
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts) ...	In Urdu ...	0	1	3	[1a.]
	„ Nagri ...	0	1	3	[1a.]
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ...	In Urdu ...	0	8	6	[1a.]
	„ Nagri ...	0	8	6	[1a.]
Act XV of 1887 (Burma Military Police) ...	In Urdu ...	0	0	9	[1a.]
	„ Nagri ...	0	0	9	[1a.]
Act XVIII of 1887 (Allahabad University)	*In Urdu* ...	0	1	0	[1a.]
Act III of 1888 (Police), as modified up to 1st March, 1833 ...	In Urdu ...	0	0	6	[1a.]
Ditto (as passed) ...	In Nagri ...	0	0	6	[1a.]

Fund is regulated, when a notice of attachment is served on the trustees, then the money standing to the credit of the subscriber, against whom the attachment is issued, is *ipso facto* forfeited to the use of the Fund. Mr. Mitter for the plaintiff first objects that the applicants are not entitled to appear. I confess I do not accede to that argument. The Fund is in the hands of the applicants. There is a Regulation, under which the applicants would be entitled under certain circumstances to refuse to pay that fund to Gainsford and to deal with it as provided under Rule 23. I fail to see why the applicants should be debarred from asserting any claim that the trustees may have to this Fund as claimants to a fund which has been improperly attached to answer the debt of Gainsford.

It is a case in which the present claimants do not assert their claims as trustees for Gainsford, but as trustees for other persons, who became entitled on service of notice of attachment of the property, to which Gainsford might have otherwise been entitled. In my opinion, to these funds the trustees are as much entitled to assert their claim under the claim sections of the Code, as any other person claiming to be entitled to the Rs. 6,000—fund in question.

Then the other argument, on which Mr. Mitter relies on the merits, is that the Act, on which Mr. Sinha relies, does not apply to the present fund, because he says it applies to compulsory deposits and that there is nothing in the affidavit to show that this was not a voluntary deposit by Gainsford; moreover the Regulations, by which the fund is governed, show there were two kinds of deposits, that is compulsory and voluntary deposits.

Now paragraph 6 of the affidavit sets out that Gainsford used to contribute to the fund under the rules and regulations, to which the affidavit refers. These rules and regulations in clause 5 contain a reference to a compulsory contribution of a sum equal to 5 per cent. on the amount of the salary of the subscriber; they also provide in sub-clause 2 that any subscriber may contribute by monthly instalments such further sum as he may think proper, provided that the total amount thus voluntarily contributed in any one year does not exceed 5 per cent. of his salary for such year. But both what is called a compulsory subscription, under

		Rs.	a.	p.	
Act XIV of 1891 (Oudh Courts)	In Urdu ...	0	0	6	[1a.]
Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1898 and XII of 1900	In Urdu ...	0	0	8	[1a.]
	" Nagri ...	0	0	6	[1a.]
Act II of 1892 (Christian Marriage Validation)	In Urdu ...	0	0	8	[1a.]
Act IV of 1892 (Bengal Court of Wards Amendment)	In Urdu ...	0	0	6	[1a.]
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment) ...	In Urdu ...	0	0	8	[1a.]
Act IV of 1893 (Partition)	In Urdu ...	0	0	8	[1a.]
Act I of 1894 (Land Acquisition) ...	In Urdu ...	0	2	8	[1a. 6p.]
	" Nagri ...	0	1	6	[1a. 6p.]
Act III of 1894 (Criminal Procedure and Penal Codes Amendment)	In Urdu ...	0	0	8	[1a.]
Act V of 1894 (Civil Procedure Code Amendment)	In Urdu ...	0	0	8	[1a.]
	" Nagri ...	0	0	3	[1a.]
Act VIII of 189 (Tariff), as modified up to 1st October, 1903	In Urdu ...	0	4	0	[1a.]
	" Nagri ...	0	8	9	[2a.]
Act IX of 1894 (Prisons)	In Urdu ...	0	1	8	[1a.]
	" Nagri ...	0	2	8	[1a.]
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment).	In Urdu ...	0	0	8	[1a.]
	" Nagri ...	0	0	3	[1a.]
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.XV. PART XI.



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1908.

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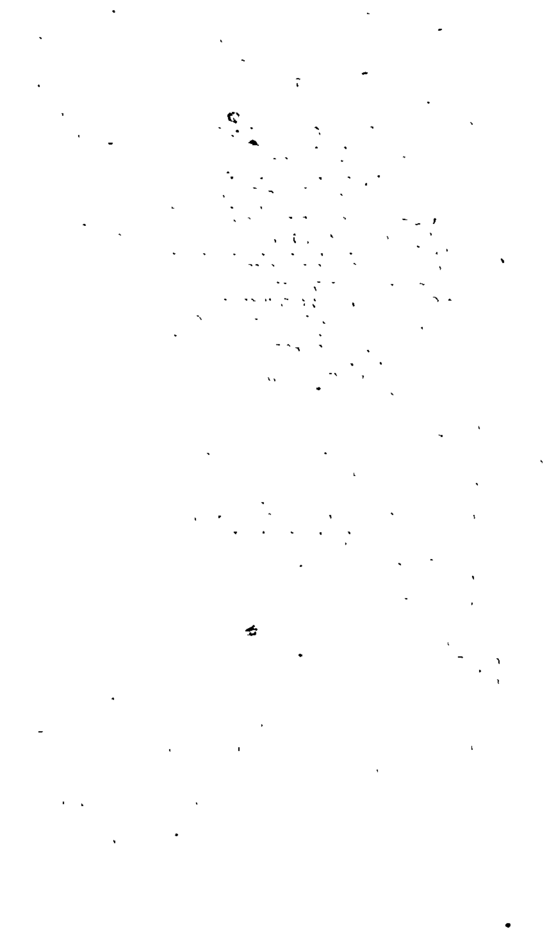
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Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1902	In Urdu	0	2	0	[1a.]
	„ Nagri	0	2	0	[1a.]
Act XVIII of 1879 (Legal Practitioners) as modified up to 1st May, 1896	In Urdu	0	2	6	[1a.]
	„ Nagri	0	3	6	[1a.]
Act XV of 1881 (Factories), as modified up to 1st April, 1891	In Urdu	0	1	6	[1a.]
	„ Nagri	0	1	6	[1a.]



		Rs.	A.	P.	
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	In Urdu ...	0	0	8	[1a.]
Ditto (as passed)	In Nagri ...	0	0	8	[1a.]
Act V of 1888 (Inventions and Designs) ...	In Urdu ...	0	2	8	[1a.]
Act VI of 1888 (Debtors)	In Urdu ...	0	0	6	[1a.]
	" Nagri ...	0	0	6	[1a.]
Act VII of 1888 (Civil Procedure Amendment)	In Urdu ...	0	1	9	[1a.]
	" Nagri ...	0	1	9	[1a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	In Urdu ...	0	0	6	[1a.]
	" Nagri ...	0	0	6	[1a.]
Act II of 1889 (Measures of Length) ...	In Urdu ...	0	0	8	[1a.]
	" Nagri ...	0	0	8	[1a.]
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904	In Urdu ...	0	1	9	[1a.]
	" Nagri ...	0	2	0	[1a.]
Act VI of 1889 (Probate and Administration)	In Urdu ...	0	0	6	[1a.]
	" Nagri ...	0	0	6	[1a.]
Act VII of 1889 (Succession Certificates)...	In Urdu ...	0	1	6	[1a.]
Act X of 1889 (Ports), as modified up to 1st June, 1894	In Urdu ...	0	5	0	[2a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895	In Urdu ...	0	2	8	[1a. 8p.]
	" Nagri ...	0	3	0	[1a. 9p.]
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904	In Urdu ...	0	0	9	[1a.]
	" Nagri ...	0	0	9	[1a.]
Act XVI of 1889 (Central Provinces Land Revenue)	In Urdu ...	0	1	6	[1a.]
	" Nagri ...	0	1	6	[1a.]
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu ...	0	0	8	[1a.]
Act I of 1890 (Revenue Recovery) ...	In Urdu ...	0	0	8	[1a.]
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881)	In Urdu ...	0	0	8	[1a.]
Act V of 1890 (Indian Forest and Burma Forests Amendment)	In Urdu ...	0	0	6	[1a.]
Act VI of 1890 (Charitable Endowments)	In Urdu ...	0	0	6	[1a.]
Act VIII of 1890 (Guardians and Wards)...	In Urdu ...	0	2	8	[1a. 9p.]
Act IX of 1890 (Railways), as modified up to 1st June, 1905	In Urdu ...	0	6	0	[2a.]
Act IX of 1890 (Railways), as modified up to 1st May, 1896 ...	In Nagri ...	0	8	0	[2a.]
Act X of 1890 (Press and Registration of Books Amendment)	In Urdu ...	0	0	8	[1a.]
Act XI of 1890 (Prevention of Cruelty to Animals)	In Urdu ...	0	0	8	[1a.]
Act XVIII of 1890 (Emigration Amendment)	In Urdu ...	0	0	8	[1a.]
Act XIX of 1890 (Salt Amendment) ...	In Urdu ...	0	0	8	[1a.]
Act XX of 1890 (North-Western Provinces and Oudh)	In Urdu ...	0	1	0	[1a.]
Act V of 1891 (Ports Act Amendment) ...	In Urdu ...	0	0	8	[1a.]
Act X of 1891 (Indian Criminal Law Amendment)	In Urdu ...	0	0	8	[1a.]

Act	Edition	Rs.	A.	P.	
Act XII of 1897 (Local Authorities Emergency Loans)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act XV of 1897 (Cantonments)	In Urdu	0	0	5	[1a.]
Act I of 1898 [Stage-Carriages Act (1861) Amendment]	In Urdu	0	0	3	[1a.]
	„ Nagri	0	0	8	[1a.]
Act III of 1898 (Lepers)	In Urdu	0	0	6	[1a.]
	„ Nagri	0	0	6	[1a.]
Act IV of 1898 (Indian Penal Code Amendment)	In Urdu	0	0	8	[1a.]
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1900	In Urdu	1	4	0	[8a.]
	„ Hindi	1	6	0	[8a.]
Act VI of 1898 (Post Office)	In Urdu	0	2	0	[1a.]
	„ Nagri	0	2	0	[1a.]
Act IX of 1898 (Live-stock Importation)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act X of 1898 (Indian Insolvency Rules)	In Urdu	0	0	8	[1a.]
Act I of 1899 [Indian Marine Act (1887) Amendment]	In Urdu	0	0	6	[1a.]
	„ Nagri	0	0	6	[1a.]
Act II of 1899 (Stamp), as modified up to 31st August, 1905	In Urdu	0	7	0	[6p.]
	„ Nagri	0	7	0	[6p.]
Act III of 1900 (Prisoners), as modified up to 1st March, 1905	In Urdu	0	2	8	[1a.]
	„ Nagri	0	2	8	[1a.]
Act IV of 1899 (Government Buildings)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act V of 1899 (Indian Evidence)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act VI of 1899 (Indian Contract Act Amendment)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment]	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act VIII of 1899 (Petroleum)	In Urdu	0	0	9	[1a.]
	„ Nagri	0	0	9	[1a.]
Act IX of 1899 (Arbitration)	In Urdu	0	0	9	[1a.]
	„ Nagri	0	0	9	[1a.]
Act XI of 1899 (Court-fees Amendment)	In Urdu	0	0	9	[1a.]
	„ Nagri	0	0	6	[1a.]
Act XII of 1899 (Currency Notes Forgery)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act XIII of 1899 (Glanders and Farcy)	In Nagri	0	2	0	[1a.]
Ditto, as modified up to 1st April, 1903	In Urdu	0	3	0	[1a.]
Act XIV of 1899 (Tariff Amendment)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act XVII of 1899 (Indian Registration Amendment)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act XVIII of 1899 (Land Improvement Loans Amendment)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act XX of 1899 (Presidency Banks)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act XXI of 1899 (Central Provinces Tenancy Amendment)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act XXIV of 1899 (Central Provinces Court of Wards)	In Urdu	0	1	8	[1a.]
	„ Nagri	0	1	8	[1a.]



Act / Regulation	Edition	Rs.	A.	P.	
Act XV of 1903 (Extradition), as modified up to 1st December, 1904	In Urdu	0	1	9	[1a.]
	„ Nagri	0	1	9	[1a.]
Act XVI of 1903 (Central Provinces Municipal)	In Urdu	0	4	0	[1a. 6p.]
	„ Nagri	0	4	0	[1a. 6p.]
Act I of 1904 (Poisons)	In Urdu	0	0	6	[1a.]
	„ Nagri	0	0	6	[1a.]
Act III of 1904 (Local Authorities Loan)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act IV of 1904 (North-West Border Military Police)	In Urdu	0	0	9	[1a.]
Act VI of 1904 [Transfer of Property (Amendment)]	In Urdu	0	0	3	[1a.]
	„ Nagri	0	0	3	[1a.]
Act VII of 1904 (Ancient Monuments Preservation)	In Urdu	0	0	9	[1a.]
	„ Nagri	0	0	9	[1a.]
Act VIII of 1904 (Indian Universities)	In Urdu	0	1	8	[1a.]
	„ Nagri	0	1	8	[1a.]
Act X of 1904 (Co-operative Credit Societies)	In Urdu	0	1	0	[1a.]
	„ Nagri	0	1	0	[1a.]
Act XI of 1904 (to revive and continue section 8B of the Indian Tariff Act, 1894)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act XII of 1904 (Emigration)	In Urdu	0	0	8	[1a.]
	„ Nagri	0	0	8	[1a.]
Act XIII of 1904 (Indian Articles of War)	In Urdu	0	0	3	[1a.]
	„ Nagri	0	0	3	[1a.]
Act XV of 1904 [Indian Stamp (Amendment)]	In Urdu	0	0	3	[1a.]
	„ Nagri	0	0	3	[1a.]
Act I of 1905 [Local Authorities Loan *(Amendment)*]	In Urdu	0	0	3	[1a.]
	„ Nagri	0	0	3	[1a.]
Act II of 1905 [Indian Universities (Validation)]	In Urdu	0	0	3	[1a.]
	„ Nagri	0	0	3	[1a.]
Act III of 1905 (Indian Paper Currency)	In Urdu	0	0	9	[1a.]
	„ Nagri	0	0	9	[1a.]
Act IV of 1905 (Indian Railway Board)	In Urdu	0	0	8	[1a.]
Act VI of 1905 (Court-fees Amendment)	In Urdu	0	1	6	[1a.]
	„ Nagri	0	0	8	[1a.]
Act VII of 1905 (Bengal and Assam Laws)	In Urdu	0	0	3	[1a.]
	„ Nagri	0	0	3	[1a.]
Regulation I of 1890 (British Baluchistan Laws)	In Urdu	......			[1a. 6p.]
Regulation V of 1890 (British Baluchistan *Forests*)	In Urdu	0	2	0	[1a. 6p.]
Regulation VI of 1893 (Hazara Forests)	In Urdu	0	2	0	[1a. 6p.]
Regulation VIII of 1896 (British Baluchistan Criminal Justice)	In Urdu	0	0	9	[1a.]
Regulation IX of 1896 (British Baluchistan Civil Justice)	In Urdu	0	2	6	[1a.]
Regulation III of 1901 (Frontier Crimes)	In Urdu	0	2	6	[1a.]
Regulation IV of 1901 (Frontier Murderous Outrages)	In Urdu	0	0	6	[1a.]
Regulation VII of 1901 (North-West Frontier Province)	In Urdu	0	4	3	[1a.]



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Ittappan v. *Manarikrama*(1), *Mahesh Narain* v. *Nowbat Pathak*(2), *Jagar Nath Singh* v. *Jai Nath Singh*(3) and *Phani Singh* v. *Nawab Singh*(4) followed.

To prove title to land by adverse possession for the statutory period, it is not sufficient to show that some acts of possession have been done; the possession required must be adequate, in continuity, in publicity and in extent to show that it is possession adverse to the competitor; in other words, the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the Statute of Limitation.

Radhamoni Debi v. *The Collector of Khulna*(5), followed. *Armstrong* v. *Morrill*(6), and *Doswell* v. *Dela Lanza*(7), referred to and approved of. *Leigh* v. *Jack*(8) and *Wali Ahmed Chowdhry* v. *Tota Meah Chowdhry*(9), referred to.

The doctrine of constructive possession applies only in favour of a rightful owner and must not as a rule be extended in favour of a wrong doer, whose possession must be confined to lands, of which he is actually in possession.

Mohini Mohan Roy v. *Promoda Nath Roy* (10), *Radha Gobind Roy* v. *Inglis*(11), *Udit Narain Singh* v. *Golabchand Sahu*(12), *Ananda Hari Basak* v. *Secretary of State*(13) and *Vithaldas Kanjishet* v. *Secretary of State*(14), followed. *Hunnicut* v. *Peyton* referred to(15).

THE question raised by this appeal was as to whether a portion of land comprised in a certain holding in mouza Cossipur in the district of the 24-Parganas belonged to the plaintiffs jointly with the second and third defendants or whether the plaintiffs had lost their right, title and interest in the same through the adverse possession of these defendants.

It was admitted that the plaintiffs and the second and third defendants were co-owners of the holding and in 1884 under a decree in a partition suit a division was made of the land comprised in the holding, but not including the disputed portion, which by mistake of the parties and of the commissioner appointed to effect the partition, was omitted from the commissioner's report and from the list of lands in the final decree in the partition suit.

On the 22nd September 1892 a lease was executed by the tenant in favour of the respondents. The plaintiffs allege that

(1) (1897) I. L. R. 21 Mad. 153.
(2) (1905) I. L. R. 32 Calc. 837; s. c. 1 C. L. J. 437.
(3) (1904) I. L. R. 27 All. 88.
(4) (1905) I. L. R. 28 All. 161.
(5) (1900) I. L. R. 27 Calc. 943.
(6) (1871) 14 Wallace 145.
(7) (1857) 20 Howard 32.
(8) (1879) 5 Ex. D. 264.
(9) (1903) I. L. R. 31 Calc. 397.
(10) (1896) I. L. R. 24 Calc. 256.
(11) (1880) 7 C. L. R. 364.
(12) (1899) I. L. R. 27 Calc. 221.
(13) (1906) 8 C. L. J. 316.
(14) (1901) I. L. R. 26 Bom. 410.
(15) (1880) 102 U. S. 369.

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It was admitted that the plaintiffs and the second and third defendants were co-owners of the holding and in 1884 under a decree in a partition suit a division was made of the land comprised in the holding, but not including the disputed portion, which by mistake of the parties and of the commissioner appointed to effect the partition, was omitted from the commissioner's report and from the list of lands in the final decree in the partition suit.

On the 22nd September 1892 a lease was executed by the tenant in favour of the respondents. The plaintiffs allege that

(1) (1897) I. L. R. 21 Mad. 153.
(2) (1905) I. L. R. 32 Calc. 837; s. c. 1 C. L. J. 437.
(3) (1904) I. L. R. 27 All. 88.
(4) (1905) I. L. R. 28 All. 161.
(5) (1900) I. L. R. 27 Calc. 943.
(6) (1871) 14 Wallace 145.
(7) (1857) 20 Howard 32.
(8) (1879) 5 Ex. D. 264.
(9) (1903) I. L. R. 31 Calc. 397.
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(11) (1880) 7 C. L. R. 364.
(12) (1899) I. L. R. 27 Calc. 221.
(13) (1906) 3 C. L. J. 316.
(14) (1901) I. L. R. 26 Bom. 410.
(15) (1880) 102 U. S. 369.



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the owners of holding No. 129, in which the plaintiffs had a five-sixths share and the two defendants had an one-sixth share. In 1884 an action for partition was brought in the Court of the Subordinate Judge of the 24-Parganas in respect of this holding. The preliminary decree, by which the shares of the parties were determined, was made in due course, and a commissioner was appointed to effect a division by metes and bounds of all the lands comprised in the holding. By a mistake of the parties to the litigation, which was shared by the commissioner, the portion now in dispute was omitted from the report. As a matter of fact, this portion was, at the time, covered with jungle and was separated from the rest of the land by a ditch; the aspect of the locality indicated that the land now in dispute was not included in holding No. 129, which had been directed by the preliminary decree to be mapped out and partitioned. The result was that the final decree in the partition suit dealt with the lands of the holding, other than what is the subject-matter of controversy in the present litigation.

The plaintiffs allege that in 1901 the second and third *defendants took exclusive possession of the disputed lands,* ousted the plaintiffs, and settled the property with the first defendant. Under these circumstances, they commenced this action on the 11th of June 1903, for declaration of their title, for recovery of possession, and for partition. At a subsequent stage of the proceedings, the plaintiffs abandoned their claim for partition, and the plaint, as it now stands, is appropriate to a suit for recovery of joint possession. The claim also originally included a sum of Rs. 30 as compensation for damage done to trees. This part of the claim, however, was also subsequently withdrawn. The suit was contested by the first defendant as also by their landlords; the former set up the title of the second and third defendants, and the latter claimed a title by adverse possession for the statutory period; they also contended that, inasmuch as holding No. 129 had formed the subject matter of the previous suit for partition, the plaintiffs were not entitled to maintain the present action.

The Court of first instance held that the suit was maintainable, and that the title of the plaintiffs had not been extinguished

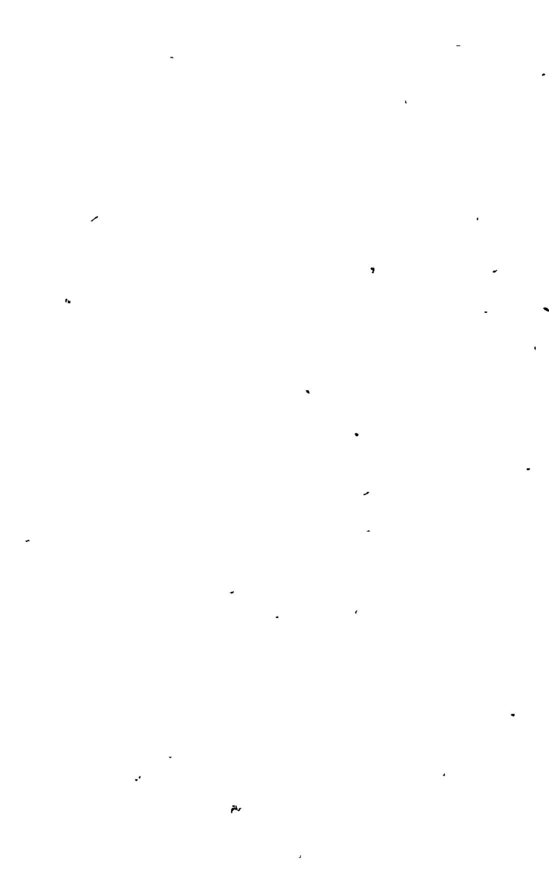
CIVIL PROCEDURE CODE (ACT XIV OF 1882) ss. 108, 157—*Suit part-heard—Adjourned hearing—Withdrawal of defendant's Counsel—Decree—Remedy.* At an adjourned hearing of a part-heard suit, the plaintiff having closed his case, and the case of the defendant having been partially entered into, Counsel for the defendant applied for a further

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effect of the decree in the partition suit was to leave unaffected the joint title and possession of the parties in the disputed land. It is obvious that there was no partition in fact, so far as these lands are concerned, for partition is the division made between several persons, of joint lands, which belong to them as co-proprietors, so that each becomes the sole owner of the part, which is allotted to him. The mere definition of the shares of the joint proprietors does not amount to partition of the property, although such determination may, as pointed out by their Lordships of the Judicial Committee in *Joy Narain Giri* v. *Girish Chunder Myti*(1) and *Chidambaram Chettiar* v. *Gauri Nachiar*(2), effect a severance of the joint interest. To effect a partition, however, the property, if susceptible of division, must be transformed into estates in severalty and one of such estates assigned to each of the former occupants for his sole use and as his sole property. If this view were not adopted, the very object of partition might be completely defeated; co-owners may desire to terminate their property relations with one another and thus avoid a continuance of that discord and irritation which must necessarily attend an association compelled by joint interest, but reprobated by every other consideration. If it were held that the mere determination of the shares by the preliminary decree was tantamount to partition, co-owners would have to enjoy their property jointly, which is precisely what they intend to avoid. If, therefore, we hold that the effect of the preliminary decree in the suit for partition was not to effect a partition of the disputed lands, it is clear that the effect of the final decree was unquestionably not to effect a partition; it is the common case of both parties that by a mistake the lands, now in dispute, were excluded from the report of the Commissioner and were not dealt with by the final decree.

How, then, can it be contended that the disputed lands were partitioned in the former litigation? One test seems to be conclusive; if the lands were partitioned, to the share of which co-sharer were they awarded? The learned counsel for the respondents found himself unable to furnish an answer to this question. He argued, however, that as the lands formed the subject matter of

(1) (1878) I. L. R. 4 Calc. 434.
(2) (1879) I. L. R. 2 Mad. 83 s. c. L. R. 6 I. A. 177.



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and nothing appears, on either side, to affect the right, which petitioners would have in any such case, if they had, by common consent, obtained the partition of a part of an estate held in common and subsequently found that a partition of the remainder of it was desirable."

This view appears to us to be consistent with principles of justice, equity and good conscience, and is supported by the decision in the case of *Cartmell* v. *Chambers*(1) and by the observations of their Lordships of the Judicial Committee in *Jagatjit Singh* v. *Sarabjit Singh*(2). We must, consequently, affirm, without hesitation, the doctrine that, although a co owner cannot enforce a partition of a part only of the common lands leaving the rest undivided, and, although the entire property must be included in the partition, yet, if by mistake or by consent of the co-owners, acting innocently and fairly, a partition of a portion only of their estate has been made, whether by order of the Court or otherwise, there is no reason why the Court should not grant a division of the remainder at the instance of one or more of the co-owners. The conclusion is, therefore, irresistible that the effect of the decree in the partition suit was to leave untouched the joint title and possession of the parties and that the present suit for recovery of joint possession may well be maintained.

The second ground taken on behalf of the appellants raises the question, whether their title has been extinguished by adverse possession on the part of their co-sharers, the second and third defendants. In our opinion, this question must be answered in the negative. The principles, which are applicable to cases of this description, in which the question arises as to whether the possession of one co-owner has been adverse to that of another, must now be taken to be well settled. The fundamental rule is that the entry and possession of land under the common title of one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all. The obvious reason for this rule is that the possession of one co-owner is, in itself, rightful, and does not imply hostility as would the possession of a mere stranger. To use the language of Mr. Justice

(1) (1899) 54 S. W. 362. (2) (1891) I. L. R. 19 Calc. 159, 172.

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adverse, ought not to be construed into an adverse possession;" mere possession, however exclusive or long-continued, if silent, cannot give one co-tenant in possession title as against the other co-tenant; see *Clymer* v. *Dawkins*(1), in which it was ruled that the entry and possession of one tenant in common is ordinarily deemed to be the entry and possession of all the tenants, and this presumption will prevail in favour of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others; when this occurs, the possession is from that period treated as adverse to the other tenants.

This view is identical with what has been adopted by this Court in the cases of *Mahomed Ali Khan* v. *Khaja Abdul Gunny*(2), *Baroda Sundari Deby* v. *Annoda Sundari Deby*(3), and *Ujalbi Bibi* v. *Umakanta Karmakar*(4). The same conclusion is supported by the case of *Ittappan* v. *Manavikrama*(5) and by the principles, which regulate the relation between joint owners, as explained in the case of *Mahesh Naram* v. *Nowbat Pathak*(6), *Jagar Nath Singh* v. *Jai Nath Singh*(7), *Phani Singh* v. *Nawab Singh*(8).

If, therefore, it is for the defendants to show not merely that they have been in sole occupation of the disputed lands, but also that there has been a disclaimer by the assertion of a hostile title and notice thereof to the appellants, either direct or to be inferred from notorious acts and circumstances, what is their position? The learned District Judge found that the circumstances, which put the plaintiffs to the knowledge of the infringement of their rights, was the execution of a lease by the tenants in favour of the respondents on the 22nd of September 1892. If so, the title of the plaintiffs was clearly in existence and was enforceable on the 11th of June 1903, when the present action was commenced. The difficulty in the way of the defendants respondents, however, does not terminate here. The facts found

(1) (1845) 3 Howard 674.
(2) (1883) I. L. R. 9 Calc. 774.
(3) (1898) 3 C. W. N. 744.
(4) (1904) I. L. R. 31 Calc. 970; s. c. 9 C. W. N. 32.
(5) (1897) I. L. R. 21 Mad. 153.
(6) (1905) I. L. R. 32 Calc. 837; s. c. 1 C. L. J. 437.
(7) (1904) I. L. R. 27 All. 88.
(8) (1905) I. L. R. 28 All. 161.



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soil for purposes for which he intended to use it (see also *Wali Ahmed Chowdhry* v. *Tota Meah Chowdhry*(1), Pollock and Wright on Possession, page 86, and Lightwood on Possession, page 199).

There is another difficulty, no less formidable, in the way of the success of the defendant. The facts found by the Court below show conclusively that the possession of the defendants did not extend over the whole tract now in dispute; whatever acts of user they have proved, if indeed they be deemed to be acts of possession sufficient to extinguish the title of the plaintiffs, did not extend over the entire land. Now it was ruled by this Court in the case of *Mohini Mohan Roy* v. *Promoda Nath Roy*(2), that the doctrine of constructive possession applies only in favour of a rightful owner, and must not, as a rule, be extended in favour of a wrong-doer, whose possession must be confined to lands of which he is actually in possession. This principle is recognized in the cases of *Radha Gobind Roy* v. *Inglis*(3), *Udit Narain Singh* v. *Golabchand Sahu*(4), *Ananda Hari Basak* v. *Secretary of State*(5) and *Vithaldas Kanjishet* v. *Secretary of State*(6). That this doctrine is well founded on reason and principle is manifest, for as was observed by Mr. Justice Strong in *Hunnicut* v. *Peyton*(7), one, who enters upon the land of another, though under colour of title, gives no notice to that other of any claim, except to the extent of his actual occupancy; the true owner may not know the extent of the defective title asserted against him, and, if, while he is in actual possession of part of the land, claiming title to the whole, mere constructive possession of another, of which he has no notice, can oust him from that part, of which he is not in actual possession, a good-title is no better than one, which is a mere pretence. Judged by this test also, the defendants have failed to prove that adverse possession on their part has extinguished the title of the plaintiffs. From every point of view, therefore, it follows that the plaintiffs are entitled to recover joint possession in the manner claimed.

(1) (1903) I. L. R. 31 Calc. 397.
(2) (1896) I. L. R. 24 Calc. 256.
(3) (1880) 7 C. L. R. 364.
(4) (1899) I. L. R. 27 Calc. 221.
(5) (1906) 3 C. L. J. 316.
(6) (1901) I. L. R. 26 Bom. 410.
(7) (1880) 102 U. S. 363.

APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Bell.

1908
June 17.

UDIT NARAIN CHAUDHURI
v.
MATHURA PRASAD.*

Decree—Execution—Civil Procedure Code (Act XIV of 1882) ss. 223 and 649—" Court, which passed the decree "—Civil Courts Act (XII of 1887) s. 13.

After a decree was obtained in the Court of the Subordinate Judge of Muzuffurpore the Local Government by notification formed Darbhanga, which was included in the Muzuffurpore district, into a separate district. Afterwards the assignee of the decree applied to the Subordinate Judge of Darbhanga for substitution of his name and execution of the decree.

The suit, if it had been instituted at the time of the application, would have had to have been instituted at the Darbhanga Court.

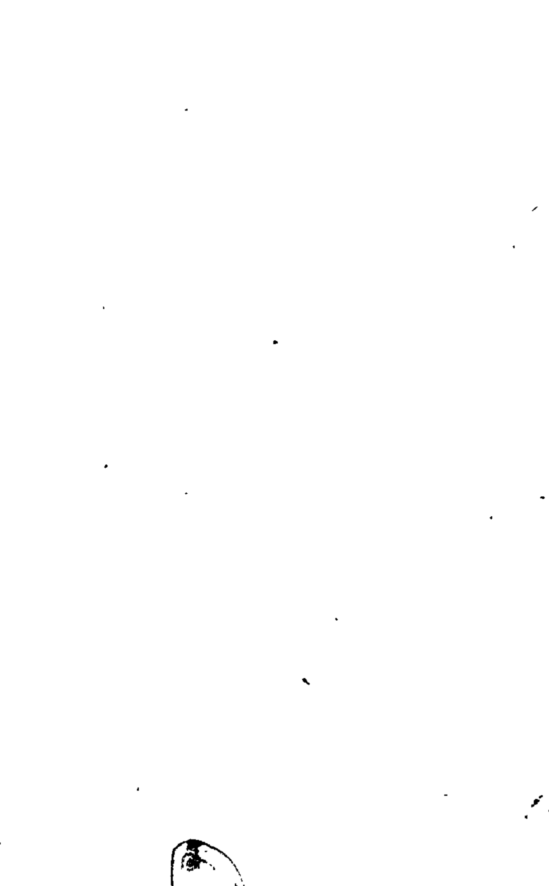
Held :—That under the provisions of s. 649 of the Civil Procedure Code the Court at Darbhanga had jurisdiction to entertain the application.

Latchman Pande v. *Madan Mohun Shye*(1) and *Jahar* v. *Kamini Debi*(2) followed. *Kalipado Mukerjee* v. *Dina Nath Mukerjee*(3) and *Panduranga Mudaliar* v. *Vythilinga Reddi*(4) distinguished.

The appellant as purchaser of three money-decrees applied in the Court of the Subordinate Judge of Darbhanga for substitution of his name in place of the decree-holder and for execution of the decrees. The decrees in question were passed on the 9th of May 1903 by the Subordinate Judge of Muzuffurpore. After the disposal of the suit the local Government by notification in March 1906 made Darbhanga, which formed part of the district of Muzuffurpore, into a separate district. The suit, if it had been instituted at the time of the application, would have had to have been instituted at the Darbhanga Court. The judgment-debtor

* Appeals from Orders Nos. 446, 494 and 495 of 1907, against the orders passed by H. E. Ransom, District Judge of Darbhanga, dated the 14th June 1907, reversing the orders of Nolini Nath Mitter, Sub-Judge of Darbhanga, dated the 8th March 1907.

(1) (1880) I. L. R. 6 Calc. 513.
(2) (1900) I. L. R. 28 Calc. 238.
(3) (1897) I. L. R. 25 Calc. 515.
(4) (1907) I. L. R. 30 Mad. 537.



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UDIT NARAIN CHAUDHURI v. MATHURA PRASAD.

The suit was instituted in the Court of the Second Subordinate Judge of Muzuffurpore at a time when Darbhanga was not made into a separate district for civil purposes. After the disposal of the suit in March 1906, notifications were issued by the local Government that certain parts of the original zillah Tirhut should be taken off the jurisdiction of the District Judge of Muzuffurpore and formed into a separate district, Darbhanga. A District Judge was appointed to take charge of this new district as well as a Subordinate Judge to try civil cases arising in it. The suit, which gave rise to the orders under these appeals, related to property, which was exclusively within the new district of Darbhanga.

Applications were made to the Subordinate Judge of Darbhanga for orders for execution and for substitution of the present appellant as decree-holder in place of the original decree-holders. Orders were made by the Subordinate Judge, but, on appeal, the District Judge of Darbhanga held that the Subordinate Judge of Darbhanga had no jurisdiction to make any orders for substitution under section 232 of the Code. In his opinion, the words "the Court which passed the decree" in section 232 applied exclusively to the Court of the Second Subordinate Judge of Muzuffurpore, which had entertained the original suit and passed the decree. He accordingly disallowed the applications for substitution and hence these appeals.

It has been contended before us that section 649 of the Civil Procedure Code enlarged the definition of the words "the Court, which passed the decree", and according to it, the Court of the Subordinate Judge of Darbhanga had jurisdiction to deal with the application for substitution. On the other, hand, it has been contended that the Court of the Subordinate Judge of Darbhanga would not, under the circumstances of the case, come within the words "the Court which passed the decree" as defined in section 649 of the Code.

The question is not *res integra*, so far as this Court is concerned. In *Latchman Pande* v. *Mudan Mohan Shye* (1) Sir Richard Garth, the then Chief Justice and Mr. Justice Field held, in a case much similar to the present, that the words "the Court, which passed

(1) (1880) I. L. R. 6 Calc. 513.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

JOGENDRA NATH RAI

v.

BALADEO DAS.*

1907
Aug. 16.

Partition—Co-owners—Dispossession—Adverse possession—Constructive possession—Waste land—Limitation.

To effect a partition the property, if susceptible of division, must be transformed into estates in severalty and one of such estates assigned to each of the former occupants for his sole use and as his sole property

Although co-owners cannot enforce a partition of a part only of the common lands, leaving the rest undivided, and although the entire property must be included in the partition, yet, if by mistake, or by consent of the co-owners acting innocently and fairly, a partition of a portion only of their estate has been made, whether by order of the Court or otherwise, there is no reason, why the Court should not grant a division of the remainder at the instance of one or more of the co-owners.

The conclusion is, therefore, irresistible that the effect of a decree in the partition suit was to leave untouched the joint title and possession of the parties (in the remainder) and that the present suit for recovery of joint possession may well be maintained.

Barnes v. *Boardman*(1) and *Cartmell* v. *Chambers*(2) referred to and *Jagatjit Singh* v. *Sarabjit Singh*(3) followed.

The fundamental rule is that the entry and possession of land under the common title of a co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all.

Ricard v. *William*(4), *Prescott* v *Nevers*(5), *Doe* v. *Prosser*(6), *Doe* v. *Taylor*(7), *McClung* v. *Ross*(8) and *Clymer* v. *Dawkins*(9) referred to and approved of. *Mahomed Ali Khan* v. *Khaja Abdul Gunny*(10), *Baroda Sundari Deby* v. *Annoda Sundari Deby*(11), *Ujalli Bibi* v. *Umakanta Karmokar*(12),

* Appeal from Appellate Decree No. 1982 of 1905, against the decree of H. Holmwood, District Judge of 24 Parganas, dated the 31st July 1905, reversing the decree of Saroda Prasad Sen, Munsiff of Sealdah, dated the 2nd February, 1905.

(1) (1892) 157 Mass. 479; s. c. 32 N. E. 670.
(2) (1899) 54 S. W. 862.
(3) (1891) I. L. R. 19 Calc. 159.
(4) (1822) 7 Wheaton. 107.
(5) (1827) 4 Mason 326; s. c. 19 Fed. Cas 1286.
(6) (1774) 1 Cowper. 217.
(7) (1833) 5 B. & Ad. 575.
(8) (1820) 5 Wheaton. 116.
(9) (1845) 3 Howard. 674.
(10) (1883) I. L. R. 9. Calc. 744.
(11) (1898) 3 C. W. N. 744.
(12) (1904) I. L. R. 31 Calc. 970

1908

JAMADAR SINGH v. SERAZUDDIN AHAMAD CHAUDHURI.

1902, the plaintiffs had obtained an *ex parte* decree for rent due from Pous 1306 to Pous 1308, that is up to the end of the quarter immediately preceding the period for which the present suit was brought. That decree was executed in 1903. In the present suit, the defendant alleged that, prior to the institution of the previous suit, he had made payments to the plaintiffs, amounting to Rs. 1,400-8, but that the plaintiffs gave him credit for Rs. 842 only in that suit The defendant therefore claimed in the present suit to have the difference of Rs. 548-8 treated as a set-off to the plaintiff's claim. The Subordinate Judge allowed the claim. The District Judge reversed that decision, holding that it did not matter that the previous rent decree was *ex parte*, and that the claim of set-off was barred by the principle of *res judicata*.

Dr. Priya Nath Sen for the appellant. The decision in the previous rent-suit cannot operate as *res judicata*, and debar the defendant from seeking to have the plaintiff's claim reduced by the sum for which no credit was given in the previous suit for two grounds: (1) the suits do not involve the same issue, or in other words, the issue, which has arisen in the present suit, did not arise in the previous suit; and (2) the subject-matters of the two suits being different, the principle of constructive *res judicata* does not apply. On the first ground, it is to be observed that the plaintiffs do not deny the payments, which the defendants desire to set-off against the plaintiffs' claim, but they say they have appropriated them towards the discharge of certain other dues in connection with mutation fees. The question is—was the defendant entitled to do so? This could not possibly have been an issue in the previous suit. A payment, which may not be a valid defence in one suit, may be a valid defence in another, so that the omission to plead a particular payment as a defence to one suit does not by itself debar the same payment from being pleaded as a defence in another. Of course, it might have been different, if in the previous suit the defendant had pleaded the particular payment, and it had been decided adversely to him, for instance, if in the previous suit the Court had found that no payment had been made, then the defendant could not have relied

in 1901 they were ousted by the second and third defendants, who took exclusive possession of the disputed land. The present suit was brought on the 11th June 1903 by the plaintiffs for recovery of joint possession with the second and third defendants. The first defendant set up the title of their landlord, the second and third defendants, who by way of their defence pleaded adverse possession for over 12 years and contended that the partition suit having dealt with the lands in the holding to be partitioned, the plaintiffs were not entitled to maintain the present suit.

In the original suit a decree was passed in favour of the plaintiffs by the Munsif of Sealdah. This decree was set aside and the judgment reversed by the District Judge of the 24-Pergunahs. Hence the present appeal by the plaintiffs to the High Court.

Babu Nilmadhub Bose (*Babu Surendra Chunder Sen* with him) for the appellants. Co-owners jointly entitled to land, on partition of the same, are not deprived with respect to each other of their right, title, or interest in a portion therein omitted by mistake of the parties to be dealt with in the partition proceedings; *Mohini Mohan Roy* v. *Promoda Nath Roy* (1), *Radha Gobind Roy* v. *Inglis*(2), *Watson & Co.* v. *Ramchund Dutt*(3).

Mr. C. C. Ghose (*Babu Provas Chunder Mitter* with him) for the respondents. The plaintiffs' appellants' proper remedy is to re-open the decree in the partition suit. They cannot proceed by way of a suit for recovery of joint possession of the omitted portion of land. I rely on Art. 127 in the second schedule of the Limitation Act (XV of 1877).

Cur. adv. vult.

MOOKERJEE AND CASPERSZ JJ. The subject-matter of the litigation, which has given rise to this appeal, is a parcel of land comprised in holding No. 129 in the khas mehal of the Government in Cossipur in the northern suburbs of Calcutta. The plaintiffs and the second and third defendants were admittedly

(1) (1896) I. L. R. 24 Calc. 256. (2) (1880) 7 C. L. R. 364.
(3) (1890) I. L. R. 18 Calc. 10.

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were finally settled. There is no question as to the payments made during the period, for which rent was sued in the previous suit. The defendant paid Rs. 1,400-8-0 and the plaintiff in the previous suit credited him with Rs 842 only, deducting Rs. 548-8-0 on account, it is said, of half mutation fees alleged by him to have been realized by the defendant from the raiyats. It is to be noted that the decree in the previous suit was duly executed. The first Court finds that the plaintiff has not satisfactorily established that the defendant realized these fees, and the District Judge has not displaced this finding. If the *ex parte* decree has not the effect, as the Judge holds it has, of settling all accounts between the parties and starting them with a clean slate from the last quarter of 1308, then the question of set-off claimed by the defendant in this suit should have been enquired into.

Now the decree was no doubt an *ex parte* one and decided no other question than that the defendant owed the plaintiff the sum of Rs. 842 for rent, after deducting Rs. 548-8-0 credited to another account. But this latter sum is the very sum which the defendant claims to set off in this suit. It was held in the previous suit to be due from the defendant, because the plaintiff had deducted that amount from the payments proved on account of other debts due from the defendant. If the defendant did not agree to that deduction, he should have raised in the previous suit the defence he raises in the present one, and, as he did not do so, under explanation II to section 13 of the Civil Procedure Code, I consider that he cannot raise it now.

The learned pleader for the appellant, however, contends that this is not so, for two reasons, (1) that the question at issue in the previous suit was different from that at issue in the present suit, and (2) that explanation II to section 13 cannot be relied on, as the subject-matters of the two suits are not the same.

I am, however, of opinion that the question, which the defendant raises in this suit, is the very question, which was at issue in the previous suit, viz., what was the amount of rent due from the defendant for the period—Pous 1306 to Pous 1308. The plaintiff in that suit alleged that it was Rs. 842. The defendant did not traverse this allegation, which he should have done, if he

in 1901 they were ousted by the second and third defendants, who took exclusive possession of the disputed land. The present suit was brought on the 11th June 1903 by the plaintiffs for recovery of joint possession with the second and third defendants. The first defendant set up the title of their landlord, the second and third defendants, who by way of their defence pleaded adverse possession for over 12 years and contended that the partition suit having dealt with the lands in the holding to be partitioned, the plaintiffs were not entitled to maintain the present suit.

In the original suit a decree was passed in favour of the plaintiffs by the Munsif of Sealdah. This decree was set aside and the judgment reversed by the District Judge of the 24-Pergunahs. Hence the present appeal by the plaintiffs to the High Court.

Babu Nilmadhub Bose (*Babu Surendra Chunder Sen* with him) for the appellants. Co-owners jointly entitled to land, on partition of the same, are not deprived with respect to each other of their right, title, or interest in a portion therein omitted by mistake of the parties to be dealt with in the partition proceedings; *Mohini Mohan Roy* v. *Promoda Nath Roy* (1), *Radha Gobind Roy* v. *Inglis*(2), *Watson & Co.* v. *Ramchund Dutt*(3).

Mr. C. C. Ghose (*Babu Provas Chunder Mitter* with him) for the respondents. The plaintiffs' appellants' proper remedy is to re-open the decree in the partition suit. They cannot proceed by way of a suit for recovery of joint possession of the omitted portion of land. I rely on Art. 127 in the second schedule of the Limitation Act (XV of 1877).

Cur. adv. vult.

MOOKERJEE AND CASPERSZ JJ. The subject-matter of the litigation, which has given rise to this appeal, is a parcel of land comprised in holding No. 129 in the khas mehal of the Government in Cossipur in the northern suburbs of Calcutta. The plaintiffs and the second and third defendants were admittedly

(1) (1896) I. L. R. 24 Calc. 256. (2) (1880) 7 C. L. R. 364.
(3) (1890) I. L. R. 18 Calc. 10.

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present one. It is, therefore, in my opinion, not necessary that the subject matters of the two suits should be the same.

Another point as to the application of explanation II to section 13, on which there is some conflict, is as to whether the matter which might and ought to have been raised in the former suit, but was not so raised, must have been heard and finally decided in the previous suit. As pointed out in the Full Bench case of *Sri Gopal* v. *Pirthi Singh* (1), this would not seem to be required. Seeing that the decree in the previous rent-suit against he defendant has been duly executed, it is clear that the matter of the set-off the defendant now claims has been at least finally decided in the previous suit.

I would, therefore, dismiss this appeal with costs.

RYVES J. The facts of this case are as follows:—The plaintiffs (respondents) the zemindars leased an *ijara mahal* to defendant (appellant) by a registered lease on 19th Bhadra 1306 (*i.e.* 4th September 1899) for a period of seven years at an annual rental of Rs. 800, payable by quarterly instalments of Rs. 200, with a stipulation that any sum not paid on due date should carry interest at 2 per cent. per mensem. In 1902 the plaintiffs brought a suit in the Court of the Subordinate Judge of Dacca against the defendant to recover arrears of rent and interest due under the lease up to the instalment of Pous in the year 1308 (January 1902).

In the plaint of that suit, the plaintiffs stated that, out of the whole amount of rent, which had become due, they had received from the defendant sums aggregating Rs. 852 towards the rent; and, giving him credit for that amount, prayed to recover the balance. Notice of the suit was served on the defendant, who is a resident of the District of Muzufferpur. He, however, did not appear; the suit was decreed *ex parte*. The defendant made no attempts to challenge that decree and allowed execution to be taken out against him for the full amount decreed.

On the 1st April 1903 the plaintiffs brought the present suit, out of which this appeal arises, in the same Court against the defendant for arrears of rent due under the same lease, for five

(1) (1897) I. L. R. 20 All. 110.

by adverse possession on the part of their co-sharers. In this view of the matter, a decree was made in favour of the plaintiffs. Upon appeal the learned District Judge has reversed this decision. He has found, upon the evidence, that the disputed land was waste at the time of the previous partition suit, and was omitted by mistake from the proceedings of the Commissioner, and, consequently from the final decree; but he has held that the plaintiffs never had a joint title to the land in dispute after the partition of 1884, and as they had failed to establish possession within 12 years of the suit, their claim must be dismissed.

The plaintiffs have now appealed to this Court, and, on their behalf, the decision of the District Judge has been challenged, substantially, on two grounds, *namely*, *first*, that in spite of what had happened in the suit for partition, the plaintiffs were entitled to have their joint title to the disputed property declared and to be placed in joint possession thereof: *secondly*, that inasmuch as the plaintiffs and the second and third defendants were co-owners, their title was not extinguished by adverse possession, as the defendants had failed to prove that there was a disclaimer by the assertion of a hostile title and notice thereof to the plaintiffs.

In support of the first point taken on behalf of the appellants, it has been argued by their learned vakil that, as the final decree in the partition suit admittedly did not deal with the disputed lands, the joint title of the co-owners was not, in any manner, affected thereby, and, as the exclusion from the partition decree was due to the mistake of the parties, the plaintiffs are not precluded from asserting their title to the property. It has been argued, on the other hand, by the learned counsel for the respondents that, as the preliminary decree directed the partition of all the lands comprised in holding No. 129, and consequently of the lands now in dispute, the proper and sole remedy of the plaintiffs appellants is to re-open the decree in the partition suit, where they might obtain the appropriate relief.

After careful consideration of the arguments, which have been addressed to us on both sides, we are of opinion that the contention of the appellants ought to prevail. In our opinion the

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RYVES J.

It has been said "Justice requires that every cause should be once fairly tried and public tranquillity demands that having been tried once, all litigation about that cause should be concluded for ever between those parties."

Reading section 13 of the Code of Civil Procedure together with explanation II, the meaning of the rule, it seems to me, would run: "No Court shall try any suit or issue, in which the matter directly and substantially in issue has been directly and substantially in issue, or which might and ought to have been directly and substantially in issue in a former suit between the same parties, etc."

If this reading is correct, then it seems to be clear that the fact, whether this sum of Rs. 548-8 now claimed, had or had not been paid by the defendant might and ought to have been made an issue in the former suit and cannot be reopened. In effect the decision of the first Court is equivalent to a denial by the Court that this sum had been paid and not credited as now alleged by the defendant, because it found that the amount due for rent for the period of the suit was as stated by the plaintiff. From this finding, it follows that the Court held on the materials before it that the statement of the plaintiff that Rs. 852 only had been paid by the defendants was correct. Two decisions of the Privy Council seem to me conclusive in this view. They are *Kameswar Pershad* v. *Raj Kumari Ruttan*(1) and *Sri Gopal* v. *Pirthi Singh*(2). I need not refer to other authorities.

The rulings relied on by the learned pleader for the appellants are the following: The first case was *Sarkum Abu Torab Abdul Waheb* v. *Rahaman Buksh*(3). According to the head note to that case, it was there decided "the relief claimed in the second suit was not *res judicata*, the subject-matters of the two suits being distinct". In the body of the judgment, however, it appears that the Court held the second suit was quite different from the first. Thus at p. 90 the judgment runs: "In the suit of 1881 the question of the title of the plaintiffs as *Khadims* was not raised either directly or indirectly. They sued them as strangers to the

(1) (1892) I. L. R. 20 Calc. 79; L. R. 19 I. A. 234.
(2) (1902) I. L. R. 24 All. 429; L. R. 29 I. A. 118.
(3) (1896) I. L. R. 24 Calc. 83.

the previous litigation, the present action is not maintainable either for the recovery of joint possession or for partition. In our opinion, this contention is not well-founded on principle and is not supported by any authorities. A very similar question arose in the case of *Barnes* v. *Boardman*(1), which related to a partition of joint-property. It transpired in the course of the suit that an action had been previously brought for partition of an estate of which the disputed lands formed part; but that, by a mistake of the parties as to their legal rights, these lands had been excluded from the previous suit, in which the decree for partition was made in respect only of the land comprised in that action. It was argued on behalf of the defendants that, as the lands had not been included in the previous suit, they could not form the subject-matter of another litigation. This contention was overruled. Mr. Justice Knowlton, who delivered the judgment of the Supreme Judicial Court of Massachussetts, observed as follows:—"It is contended that the Court will not make an order for a partition of a part only of an estate held by tenants in common and that, therefore, when a partition has been made, which does not include all the lands that should have been included, the Court will not, in a new proceeding, do that which should have been done in the original suit. It is true that a petition for a partition of a part of an estate held by tenants in common will not be entertained against the objection of any person interested. Ordinarily, a petition of this kind should include the entire estate held in common, but it does not follow, *if by mistake* or *by the consent of all* the tenants, a partition has been made of a portion of their estate, whether by order of the Court, or otherwise, that the Court is powerless to divide the remainder on a petition of one or more of the tenants in common. It would be a harsh rule that, after a division of a part of an estate, partition of the remainder could never be ordered by the Court. When parties have acted innocently and fairly in making or obtaining a division, which does not cover all their estate, there is no reason why the law should not aid them, when they ask for a division of the remainder. The parties seem to have proceeded under a mistake in regard to their legal rights

(1) (1892) 157 Mass. 479; s. c. 32 N. E. 670.

APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

1908
June 30.

GOLAM MAHOMED
v.
SHIBENDRA PADA BANERJEE.*

Civil Procedure Code (Act XIV of 1882) s. 373—Act X of 1859—Suit for rent—Withdrawal of suit.

The provisions of s. 373 of the Civil Procedure Code (Act XIV of 1882) have no application to suits instituted under Act X of 1859, which is a complete Code by itself.

Nilmoni Singh Deo v. *Taranath Mukerjee* (1), *Sadai Naik* v. *Serai Naik* (2) discussed and distinguished.

Mokunda Buliav Kar v. *Bhagaban Chunder Das* (3), *Radha Madhub Santra* v. *Lukhi Narain Roy Chowdhry* (4), *Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (5), *Hare Krishna Mahanti* v *Bishun Chandra Mahanti* (6) referred to.

Second Appeal by Sheikh Golam Mahomed and others, the defendants Nos. 1 to 4.

The plaintiffs sued on the 13th June, 1904, for the recovery of arrears of rent and cesses for 1308 to 1311, in the Court of the Deputy Collector of Puri, under Act X of 1859.

Shibendra Pada Banerjee, the principal plaintiff-respondent, held a two-anna share in the *jagir* named Garjit Andhari, in which the taluk in suit is situated.

The plaintiff had previously instituted a suit for arrears of rent for the years 1306 to 1309 against the same defendants; but on his application to withdraw the suit, with liberty to bring a fresh suit, it was dismissed on the 30th January, 1903.

* Appeal from Appellate Decree, No. 1830 of 1906, from a decision of J. J. Platel, District Judge of Cuttack, dated June 14, 1906, confirming a decision of Radha Kanta Banerjee, Deputy Collector of Puri, dated April 14, 1905

(1) (1882) I. L. R. 9 Calc. 295
(2) (1901) I. L. R. 28 Calc. 532.
(3) (1894) I. L. R. 21 Calc. 514.
(4) (1893) I. L. R. 21 Calc. 428.
(5) (1891) I. L. R. 18 Calc. 368.
(6) (1908) 7 C. L. J. 426.

Story in *Ricard* v. *Williams*(1) the law will never construe a possession tortious, unless from necessity; on the other hand, it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful, and this upon the plain principle that every man shall be presumed to act in obedience to his duty, until the contrary appears. In other words, as the same learned Judge put it in *Prescott* v. *Nevers*(2), the only difference between the possession of a co owner and other cases is that, acts, which, if done by a stranger would *per se* be a *disseisin*, are in the case of tenancies in common perceptible of explanation consistently with the real title; acts of ownership are not, in tenancies in common, acts of *disseisin*. It depends upon the intent with which they are done and their notoriety; the law will not presume that one tenant in common intends to oust another; the facts must be notorious and the intent must be established in proof." It follows consequently that one co-owner may hold adversely to his co-parcener, and, if his possession is continued uninterruptedly for the statutory period, he will acquire an indefeasible title (*Doe* v. *Prosser*(3). *Doe* v. *Taylor*(4).) This is true, whether the original entry was with intent to hold adversely or whether the entry was that of a tenant in common. Much stronger evidence, however, is required to show an adverse possession held by a tenant in common than by a stranger; a co-tenant will not be permitted to claim the protection of the Statute of Limitations, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him; it must further be established that the fact of adverse holding was brought home to the co-owner, either by information to that effect given by the tenant in common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and *disseisin* are intended to be asserted; in other words, in the language of Chief Justice Marshall in *McClung* v. *Ross*(5), "a silent possession, accompanied with no act which can amount to an ouster or give notice to his co-tenant that his possession is

(1) (1822) 7 Wheaton 107.
(2) (1827) 4 Mason 326; s. c. 19 Federal Cases, 1286.
(3) (1774) 1 Cowper 217.
(4) (1833) 5 B. & Ad. 575.
(5) (1820) 5 Wheaton 116.

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GOLAM MAHOMED v. SHIBENDRA PADA BANERJEE.

s. 373 of the Code of Civil Procedure has no application to the present case.

CASPERSZ AND SHARFUDDIN JJ. This appeal arises out of a suit for recovery of arrears of rent and cesses, together with damages, for the years 1308, 1309, 1310 and 1311 by Shibendra Pada Banerjee, a fractional co-sharer of the *jagir* mehal, in which the taluk in suit is situated. The suit was instituted in the Court of the Deputy Collector of Puri under Act X of 1859.

It appears that the plaintiff had previously brought a suit for arrears of rent for the years 1306, 1307, 1308, and 1309 against the appellants, which he withdrew, and the suit was thereupon dismissed. In the first suit, which was subsequently withdrawn, the plaintiff had put in an application on the 30th January 1903 for permission to withdraw from his suit, with liberty to institute a fresh suit, on which the order passed was to the following effect:—"The plaintiff's pleader applies for withdrawing the suit, withdrawal permitted, suit being dismissed. The application for withdrawal was filed before delivery of judgment." This order was passed on the 30th January, 1903. In the present case, the First Court decreed the plaintiff's suit and that decree has been affirmed on appeal by the District Judge of Cuttack on the 28th June 1906.

In second appeal before us, the points urged are, *first*, that the plaintiff cannot recover any rent from the appellants on the ground of want of title; *secondly*, that, under section 373 of the Civil Procedure Code the claim of rent for 1308 and 1309 is barred, inasmuch as in withdrawing from the previous suit, the plaintiff did not obtain any permission to institute a fresh suit, and that not having done so, he cannot maintain this suit in respect of the years 1308 and 1309; and, *thirdly*, that the plaintiff cannot maintain a suit for a proportionate share of the rent.

The findings of the lower Appellate Court on the first and third points conclude us, as there were distinct findings for the plaintiff with regard to his title and separate collection. The findings are in the following terms:—"Now plaintiff has conclusively shown himself to be entitled to 2 annas share of the

by the learned District Judge in his judgment show conclusively that the user of the land by them or their tenants was of a description, which could not possibly create in them a title by adverse possession to the whole of the lands now in controversy. As was observed by their Lordships of the Judicial Committee in the case of *Radhamoni Debi* v. *The Collector of Khulna*(1), to prove title to land by adverse possession for the statutory period, it is not sufficient to show that some acts of possession have been done; the possession required must be adequate in continuity, in publicity and in extent, to show that it is possession adverse to the competitor; in other words, the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the Statute of Limitation, or as was observed by Mr. Justice Clifford in *Armstrong* v. *Monill*(2) and by Mr. Justice Maclean in *Dos-well* v. *Dela Lanza*(3), the possession, in order that it may bar the recovery, must be continuous and uninterrupted as well as open, notorious, actual, exclusive and adverse. Judged by this test, the acts of possession proved on behalf of the defendants and their tenants fall far short of what would be necessary to extinguish the title of the appellants. The land was originally undoubtedly waste and continued to be so for many years; the neighbours and the persons employed in certain mills used the abandoned waste as a convenient place for the purposes of nature, and the first substantial use made by the defendants, which may in any sense be regarded as a hostile assertion of title on their part and ouster of the appellants, was within 12 years of this suit. There is nothing to show that beyond 12 years there were any positive acts referrable only to the intention of the defendants to acquire exclusive control of the disputed land; there were no acts, which could be regarded as adverse to the existing title. Indeed, they were not acts of possession at all; in other words to use the language of Bramwell L. J. in *Leigh* v. *Jack*(4), the acts of user were not enough to take the soil out of the plaintiff and vest it in the defendant, because in order to defeat a title by dispossessing the owner, acts must be done, which are inconsistent with his enjoyment of the

(1) (1900) I. L. R. 27 Calc. 93.
(2) (1871) 14 Wallace 145.
(3) (1857) 20 Howard 32.
(4) (1879) 5 Ex. D. 264.

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The learned vakil for the appellants stated that he does not ask for a decree for ejectment as against the first defendant, who has been let into occupation of the land by the second and third defendants, who are co-sharers of the plaintiffs in the property. The plaintiffs are content to have a decree for declaration of title as against the first defendant and to be placed in joint possession as landlords along with their co-sharers.

The result, therefore, is that this appeal must be allowed, and the decree of the learned District Judge reversed. The plaintiffs will have a decree, which will declare their title to a five seventh share of the lands in dispute and will entitle them to recover joint possession thereof along with the second and third defendants. They will, however, not be entitled to eject the first defendant in execution of this decree.

It appears from the proceedings of the Courts below that a portion at any rate of the lands included in the present litigation is in the occupation of other persons, who are not parties to this suit and who apparently have encroached upon these lands as part of holding No. 115. It is, therefore, necessary to declare that the plaintiffs will not be entitled in execution of this decree to disturb the possession of such persons, if any, as are not parties to the present litigation. The plaintiffs are entitled to their costs in all the Courts.

Decree reversed.

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GOLAM MAHOMED v. SHIBENDRA PADA BANERJEE.

Nilmoni Singh Deo v. *Taranath Mukerjee* (1) was relied upon; but it was held that, inasmuch as the suit was dealt with on appeal, by the District Judge, though it was a suit for rent under Act X of 1859, the decree of the Appellate Court became a decree of the Civil Court, and hence an appeal would lie to the High Court. Neither of the cases cited relates to the question whether section 373 of the Civil Procedure Code applies to suits under Act X of 1859.

On the other hand, we find in *Mokunda Bullav Kar* v. *Bhagaban Chunder Das* (2), that it has been distinctly held that section 373 of the Civil Procedure Code does not apply to suits under Act X of 1859, which is a complete Code by itself. The same view was taken in the case of *Radha Madhab Santra* v. *Lukhi Narain Roy Chowdhry* (3). We find that in these two cases, the facts were very similar to those of the present case and that in both the cases the plaintiffs, in withdrawing from the previous suits, had not obtained any permission to institute fresh suits.

In *Mokunda Bullav Kar* v. *Bhagaban Chunder Das* (2) the decision of the Judicial Committee in *Nilmoni Singh Deo* v. *Taranath Mukerjee* (1) was referred to, and there, also, it was held that the question discussed by the Privy Council was simply whether a Revenue Court under Act X of 1859 had any authority to transfer an execution case from its own file to the Civil Court of another district for the purpose of execution of the decree.

In *Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (4), it was held that the provisions of section 14 of Act XV of 1877 (the Limitation Act) are not applicable to suits for arrears of rent under Act X of 1859, since that Act has always been considered as a complete Code by itself.

In *Hare Krishna Mahanti* v. *Bishnu Chandra Mahanti*(5), the learned Judges discussed the authorities with reference to Act X of 1859 being a complete Code by itself. In this case it was held that the provisions of sections 560 and 588 sub. s. (27) were applicable by reason of the provisions of section 161 of Act X of 1859, and Stephen J. in his judgment goes on to say:—"This

(1) (1882) I. L. R. 9 Calc. 295.
(2) (1894) I. L. R. 21 Calc. 514.
(3) (1893) I. L. R. 21 Calc. 428.
(4) (1891) I. L. R. 18 Calc. 368.
(5) (1908) 7 C. L. J. 426.

contended that under s. 223 of the Civil Procedure Code the application should have been made in the Court of the Subordinate Judge of Muzuffurpore, who passed the decree. On behalf of the applicant it was urged that the application could under s 13 of the Civil Courts Act (XII of 1887) and s. 649 of the Civil Procedure Code, be entertained by the Darbhanga Court. The latter Court held that it had jurisdiction to entertain the application and ordered the name of the applicant to be substituted and the decree to be executed.

The judgment-debtor appealed to the District Judge of Darbhanga, who decreed the appeal, holding that the Subordinate Judge had acted without jurisdiction and that consequently the proceedings were invalid.

The applicant appealed to the High Court.

Babu Sorashi Charan Mitra for the appellant. The words "the Court which passed the decree" in s. 223 of the Procedure Code have been by s. 649 made to include, in a case, where the Court, which passed the decree, ceases to exist or to have jurisdiction to execute it, the Court, which would have jurisdiction to try such suit, if the suit were instituted at the time of making the application for execution of the decree. The Darbhanga Court therefore had jurisdiction to deal with the application—See the construction put upon s. 649 in *Latchman Pande* v. *Madlan Mohan Shye*(1) and *Jahar* v. *Kamini Debi*(2).

Babu Dwarka Nath Mitter for the respondent. Under the circumstances of the case the Darbhanga Court would not come within the words "the Court which passed the decree" as defined in s. 649 of the Civil Procedure Code; see the observations of the learned Judges in *Kali Pado Mukerji* v. *Dino Nath Mukerjee*(3), which case was relied upon by the learned Judges of the Madras High Court in *Panduranga Mudaliar* v. *Vythilinga Reddi*(4).

MITRA AND BELL JJ. These three appeals have arisen out of three proceedings in execution of orders made in the same suit.

(1) (1880) I. L. R. 6 Calc. 513.
(2) (1900) I. L. R. 28 Calc. 238.
(3) (1897) I. L. R. 25 Calc. 315.
(4) (1907) I. L. R. 30 Mad. 537.

APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Bell.

1908
June 22.

PEARY MOHON ROY
v.
KHELARAM SARKAR.*

Limitation Act (XV of 1877) Art. 109—Mesne profits—Patni—.

A *patni mahal* was sold under Regulation VIII of 1819 for arrears of rent on the 18th May 1900, when the defendant-purchaser came into possession.

The plaintiff-owner of the *patni* instituted a suit for setting aside the sale and obtained a decree and took possession on the 11th September 1901.

The plaintiff then instituted the present suit on the 6th April 1904 for *mesne* profits for the period the defendant was in possession, viz., from 18th May 1900 to 11th September 1901.

Held, that the defendants wrongfully received profits, which were receivable by the plaintiff. Art. 109 and not Art. 120 governed the case, and the claim for the period (18th May 1900 to 5th April 1901) preceding three years next before the institution of the suit was barred by limitation.

Krishnanand v. *Kunwar Partab Narain Singh* (1) and *Dhanpat Singh* v. *Saraswati Misrain* (2) referred to.

Lot Radhabhallabpore, of which the plaintiff was the *patnidar* under the Maharaja of Burdwan, was sold for arrears of rent under Regulation VIII of 1819 and purchased by the defendant No. 1 on the 18th May 1900; afterwards the first defendant by a deed of gift transferred the property to his wife, the second defendant.

The plaintiff instituted a suit for setting aside the sale and on the 27th February 1901 obtained a decree for possession and on the 11th September 1901 took possession of the property. The plaintiff then instituted the present suit on the 6th April 1904 for *mesne* profits for the period that the defendants were in possession, viz., from 18th May 1900 to 11th September 1901.

* Appeal from Appellate Decree No. 1480 of 1906, against the decree of S. B. Chowdhuri, District Judge of Hooghly, dated the 22nd May 1906, reversing the decree of D. N. Sarkar, Subordinate Judge of Hooghly, dated the 31st May 1905.

(1) (1884) I. L. R. 10 Calc. 785. (2) (1891) I. L. R. 19 Calc. 267.

the decree" did not exclude the Court, which originally passed the decree, but merely included another Court, namely, the Court, which had jurisdiction to execute the decree on the transfer of jurisdiction. The learned Judges put a wide and convenient construction on the following words in section 649, namely "the Court, which passed the decree to be executed, has ceased to exist or to have jurisdiction to execute it."

UDIT NARAIN CHAUDHURI v. MATHURA PRASAD.

The same view was taken in another case in this Court, *Jahar* v. *Kamini Debi*(1). Prinsep and Hill JJ. were of opinion that *Latchman Pande* v. *Madan Mohan Shye*(2) was correctly decided, and that applications for execution could be entertained either by the Court, which passed the decree or the Court, which at the time of the application had local jurisdiction with respect to the subject matter of the suit.

A contrary view appears at first sight to have been taken in the case of *Kalipada* v. *Dina Nath Mukerjee*(3). It was held in that case that where the District Judge, in the exercise of the powers conferred on him by section 13 of the Bengal North-Western Provinces and Assam Civil Courts Act had so assigned the jurisdiction of a Munsif, that the result was that the Munsif, who had originally decided a case, had no jurisdiction with respect to the original subject matter, the Court, which passed the decree, had exclusive jurisdiction to entertain an application for execution. There are some observations in the judgments of the learned Judges, which might favour the contention of the respondent in the present case. But the judgments passed in the above case were discussed in the later case of *Jahar* v. *Kamini Debi*(1) and it was distinguished from the case of a change of jurisdiction by a notification of the Government of Bengal.

We are also of opinion that the case of *Kalipado Mukerjee* v. *Dina Nath Mukerjee*(2) was decided on facts, which are quite different from the facts of the present case. We are not bound by the *obiter* observations of the learned Judges in that case. We prefer to follow the decisions in *Latchman Pande* v. *Madan Mohan Shye*(2) and *Jahar* v. *Kamini Debi*(1), and no good reasons

(1) (1900) I. L. R. 28 Calc. 238. (2) (1880) I. L. R. 6 Calc. 513.
(3) (1897) I. L. R. 25 Calc. 315.

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Held, that the defendants wrongfully received profits, which were receivable by the plaintiff. Art. 109 and not Art. 120 governed the case, and the claim for the period (18th May 1900 to 5th April 1901) preceding three years next before the institution of the suit was barred by limitation.

Krishnanand v. *Kunwar Partab Narain Singh* (1) and *Dhunput Singh* v. *Saraswati Misrain* (2) referred to.

Lot Radhabhallabpore, of which the plaintiff was the *putnidar* under the Maharaja of Burdwan, was sold for arrears of rent under Regulation VIII of 1819 and purchased by the defendant No. 1 on the 18th May 1900; afterwards the first defendant by a deed of gift transferred the property to his wife, the second defendant.

The plaintiff instituted a suit for setting aside the sale and on the 27th February 1901 obtained a decree for possession and on the 11th September 1901 took possession of the property. The plaintiff then instituted the present suit on the 6th April 1904 for *mesne* profits for the period that the defendants were in possession, viz., from 18th May 1900 to 11th September 1901.

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(1) (1884) I. L. R. 10 Calc. 785. (2) (1891) I. L. R. 19 Calc. 267.

upon the allegation of the same payment in the present suit, but as it is, there has been no such adjudication, and it cannot be said that the previous *ex parte* decision necessarily involved such an adjudication as would negative the plea raised in the present suit. On the second ground, I contend that there is no identity of subject-matter. I do not impugn the previous rent-decree, nor do I wish to go behind it. I only want to get credit for a payment, which I have made in the present suit, which relates to arrears for a different period. Constructive *res judicata* does not apply here: *Sarkum Abu Torab Abdul Waheb* v. *Rahaman Buksh* (1); *Kailash Mondul* v. *Baroda Sundari* (2); *Rajendra Nath Ghose* v. *Tarangini Dasi* (3); *Surjiram Marwari* v. *Barhamdeo Persad* (4); *Woomesh Chandra Maitra* v. *Barada Das Maitra*(5) See also cases cited at page 87 of Hukum Chand on *Res Judicata*.

Babu Surendra Nath Guha for the respondents. The question, whether an *ex parte* rent-decree should operate as *res judicata* or not was left undecided in *Modhusudan Shaha Mundul* v. *Brae*(6). I rely on Sir Richard Garth's judgment in *Birchunder Manickya* v. *Hurrish Chunder Dass*(7).

Dr. Priya Nath Sen in reply. No question of *res judicata* was decided in the case of *Birchunder Manickya* v. *Hurrish Chunder Dass* (7). All that was decided in that case was that an *ex parte* decree for rent was admissible in evidence in a subsequent suit, for what it was worth.

Cur. adv. vult.

RAMPINI, A. C. J. The defendant is the appellant before us. The facts of the case are fully set forth in the judgment of the District Judge.

The only question we have to decide is, whether the District Judge is right in holding that the *ex parte* decree for rent due from Pous 1306 to Pous 1308 had the effect of *res judicata* and of deciding that all accounts between the parties up to Pous 1308

(1) (1896) I. L. R. 24 Calc. 83.
(2) (1897) I. L. R. 24 Calc. 711.
(3) (1904) 1 C. L. J. 248.
(4) (1905) 1 C. L. J. 337.
(5) (1900) I. L. R. 28 Calc. 17.
(6) (1889) I. L. R. 16 Calc. 300.
(7) (1878) I. L. R. 3 Calc. 383.

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PEARY MOHON ROY v. KHELARAM SARKAR.

of the view, which the lower Courts took, they relied on the decision of this Court in *Dhunput Singh* v. *Saraswati Misrain*(1). That was, however, a case, not for *mesne* profits, but for rent, and the question raised in it was whether the plaintiff, who was the landlord and was in possession, having himself purchased at the sale under the Putni Regulation, could sue for rent for the period during which he was in possession. The answer was that the plaintiff was not a trespasser within the meaning of the rule that a landlord, who causes trespass on the land of his tenant, is not entitled to rent for the period of his trespass. All that the Court held in that case was that it was not a trespass of the latter kind, that the case was distinguishable and that the plaintiff would be entitled to recover rent after giving credit for the amount, if any, that he actually recovered from the tenants in occupation.

Art. 109 of the Second Schedule of the Limitation Act is clear in its terms. It relates to the profits of immoveable property belonging to the plaintiff, which have been wrongfully received by the defendants. In the present case there can be no doubt that the defendants or either of them wrongfully received profits, which were actually receivable by the plaintiff, but for the illegal *patni* sale, which was afterwards set aside. The period of limitation is three years and it runs from the time, when the profits were received. No question arises on the words of the article, when the cause of action arose. The words "cause of action" are not used. That the view we take is correct is clear from the words, which follow, in the third column, namely, "where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession." The Legislature limits the conditions under which the period of three years may be extended. If a person takes possession in execution of his decree and the defendant afterwards succeeds in getting the decree of the first Court set aside on appeal and then takes possession, his right to sue for mesne-profits accrues from the date, when he gets a decree from the appellate Court. Such a case is excepted from the ordinary rule. No other case is excepted. We must, therefore construe the words "when the profits are received" as meaning

(1) (1891) I. L. R. 19 Calc. 267.

contended that he had paid more than Rs. 842. The defence, which the defendant *raises in this suit, is the very same as that* which he should have raised in the previous suit, viz, that he did not owe so much as Rs. 842 for that period and that the plaintiff had improperly failed to credit him with the sum of Rs 548-8. In support of his second plea, the learned pleader for the appellant has cited the following cases, viz, *Sirkum Abu Torab Abdul Waheb* v. *Rahaman Buksh*(1), *Kailash Mundul* v. *Baroda Sundari Dasi*(2), *Woomesh Chandra Maitra* v. *Barada Das Maitra*(3), *Rajendra Nath Ghose* v *Tarangini Dasi*(4), and *Surjiram Marwari* v. *Barhamdeo Persad*(5). I do not think it necessary to discuss all these cases at length. It is sufficient to say that, although in some of these cases there are expressions, which support the plea of the learned pleader for the appellant, I think all that is meant is that, as held by Banerjee, J. in *Rajendra Nath Ghose* v. *Tarangini Dasi*(4), "the explanation would have meaning and effect, where the subject-matter is the same in the two suits, *or* where the subject-matter of the second suit is the same as that of the issue tried in the first suit, notwithstanding that any ground of attack or defence was not expressly raised." The limitation that for explanation II of section 13 to have any application, the subject-matters of the two suits must be the same, is not to be found in section 13 itself. If this view were strictly applied, then in suits *for arrears of rent there could be no res judicata* at all, for the subject-matters of successive suits for arrears of rent are necessarily different. But what the rulings cited by the learned pleader for the appellant must mean is, as laid down by section 13, that the matter directly and substantially at issue must have been directly and substantially at issue in the previous suit. They cannot and do not, in my opinion, lay down that both the issues *and* the subject matters of the two suits must be the same, before explanation II can be applied. Now, I have already pointed out that the question as to the amount of rent due by the defendant from 1306 to 1308 was the question at issue in the previous rent suit against the defendant and is at issue in the

(1) (1896) I. L. R. 24 Calc. 83.
(2) (1897) I. L. R. 24 Calc. 711.
(3) (1900) I. L. R. 28 Calc. 17.
(4) (1904) 1 C. L. J. 243.
(5) (1905) 1 C. L. J. 337.

APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

1908
April, 23.

LACHMI NARAIN
v.
MAZHAR ABBAS.*

Mesne profits—Zerait land—Rent—Competition rent—Assessment, principle of—

As regards *zerait* land, *mesne profits* should be assessed on the basis of produce or competition rent and not customary rent.

The character of the possession before trespass should be ascertained to arrive at the true measure of damages, because such possession is a fair index of intention as to the mode of occupation, if there were no trespass.

Ijatulla Bhuyan v. *Chandra Mohan Banerjee*(1) and *Gopal Chunder Mandal* v. *Bhooban Mohun Chatterjee*(2) approved.

Principle upon which *mesne profits* should be assessed on the basis of produce or competition rent discussed. *Thakooranee Dassee* v. *Bisheshur Mookerjee*(3) referred to.

APPEAL by the plaintiff.

On the 29th July 1902 the plaintiff obtained a decree for recovery of possession of 69 bighas and 15 cottas of land as his *zerait* land with mesne profits. The decree directed that mesne profits should be ascertained in the execution proceedings. The decree-holder applied under s. 244 of the Code of Civil Procedure for the determination of the amount of mesne profits from the 18th February 1898 to the date of delivery of possession. There was no dispute as to the amount of mesne profits for the first two years, but the plaintiff contended that as he was entitled to *khas* possession after those two years, the amount of mesne profits for the subsequent period should be assessed on the basis of produce. On the application of the plaintiff a Commissioner was appointed to ascertain the amount of mesne profits, who found after investigation that the total amount of mesne profits calculated on the

* Appeal from Order No. 49 of 1907, against the order passed by Rajendra Nath Dutt, Subordinate Judge of Chapra, dated the 10th September 1907.

(1) (1907) 12 C. W. N. 285.
(2) (1903) I. L. R. 30 Calc. 536.
(3) (1865) B. L. R. F. B. 202; 3 W. R. (Act X) 29.

instalments from Chaitra, 1308. The defendant contested the suit, and the main defence was that, for the period covered by the previous suit, he had in fact paid sums amounting to Rs. 1,400-8 annas *as rent*, whereas the plaintiff had given him credit for Rs. 852 only. In the written statement it is stated, "in the said suit (*i.e.* the previous suit) the plaintiff did not give credit for the total amount of Rs 548-8, paid by the defendant on different dates on account of the rent of the *mahal* under claim . . . . . The defendant is entitled to get credit for the said amount and a set-off against the present claim; and the defendant accordingly prays for the same. As the plaintiffs have brought the present suit by artfully omitting to credit the same amount, they cannot get any relief. All the documents that are with the defendant showing that the aforesaid amount has been paid, are filed herewith."

In the first Court, it was contended on behalf of the plaintiffs that this plea of "set off" was barred by the rule of *res judicata*.

This plea was overruled by the Court of first instance, which held that Rs. 548-8 had in fact been paid by the defendant towards the rent for the period covered by the former suit and had wrongly been credited by plaintiffs to another account, and, deducting this amount, gave plaintiffs a decree for the balance claimed. This decree was reversed on appeal by the District Judge.

The defendant has appealed to this Court. The only ground pressed in appeal is that the rule of *res judicata* does not apply. It was argued that that rule does not apply, *firstly*, because the subject-matter of the two suits was not identical, being sums of money due as rent for different years, and *secondly*, that the issue in this case, whether Rs. 548-8 had been paid by defendant to plaintiff as rent in the years covered by the former suit, had not been "heard and finally decided" in that suit and that consequently that decision did not bar the hearing of the issue in this suit. A number of authorities were relied on in support of these arguments and I will refer to them later.

The fundamental principles, on which the rule of *res judicata* is based, are well known and are common to all modern jurisprudence.

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he had let out the land, but he alleged that the leases to the *raiyats* expired with the year 1307F.S., and he was entitled to *khas* possession from 1308F.S., and that, therefore, he was entitled to damages from 1308 to Baisakh 1311F.S., the measure of which should be the actual price of the produce less the necessary costs of cultivation. On the application of the plaintiff, the lower Court appointed a Commissioner to ascertain the amount of mesne profits by means of an investigation at the spot, and the Commissioner found, after an elaborate investigation, that the total amount of mesne profits calculated on the basis of rent for the earlier period and on the basis of produce for the later period, with interest at 12 per cent. per annum would be Rs. 12,805-6-6. The defendant, however, contended that mesne profits should be assessed on the basis of rental for the entire period. On a rental-basis, the amount with interest was found to be Rs. 3,192-12-6 and that is the amount which the lower Court has allowed with costs and subsequent interest at 6 per cent. per annum.

The appeal of the plaintiff and the cross-appeal of the defendant have reopened the entire case before us, but it is not necessary to dwell upon the slender argument in support of the cross-appeal. The main contentions raised before us are based on the rival principles of calculation for the years 1308 to 1311F.S., namely, whether the mesne profits should be calculated on the rental or produce basis?

The dispute as to the facts bearing on the question of principle of assessment relates to the mode of enjoyment by the defendant during the later period. The plaintiff attempted to make out by evidence that the defendant was, throughout the period in *khas* possession, cultivating the land and reaping ordinary country crops; while the defendant asserted that, during the years 1308 and 1309F.S., he cultivated the lands with indigo for his Trikalpore Factory and that he was a loser by such cultivation as the price of indigo went down owing to a well known cause, and that, during the last two years, he let out the land to raiyats on money rent. The lower Court has held that the defendant and his witnesses have given the facts correctly. It has found that the defendant did cultivate the lands with indigo in 1308 and

office and failed in their suit in consequence of having put their claim exclusively upon that footing". That being so, it was held that the second suit, based on a totally different title, was not barred. It is significant, too, that after examining a number of authorities quoted in support of the opposite view, their Lordships held, immediately before the sentence above quoted, "these cases go to show that when a question has necessarily been decided in effect, though not in express terms, between the parties to a suit, it cannot be raised again, although in a different form, between the same parties in another suit"

Now, as I have said above, the decision of the first Court in effect was that Rs. 852 only had been paid by the defendant as rent for the years covered by that suit. This case therefore, on examination does not seem to help the appellant. The next case was *Kailash Mondul* v. *Baroda Sundri Dasi*(1). At first sight that case and certain observations of Banerjee, J., in particular, do appear to support his argument. The learned Chief Justice said: "All that the Court previously decided was that a particular amount of rent he claimed was due from the defendant to the plaintiff. Can it be said to follow that the rent now claimed is of necessity, by reason of that decision, equally due from the defendant or that the defendant is to be debarred from setting up any defences he may have to the present action?"

He goes on to say with reference to explanation II: "We have no materials before us to enable us to say that the matter, which the defendant now desires to set up, might or ought to have been made a ground of defence in the particular action in respect of that particular rent."

This is enough to distinguish this case. It is true that in that case Banerjee J. observed at page 714, and his observations have been embodied in the head-note, granting that the matter now in issue might and ought to have been made a ground of defence in the former suit, the question still remains, whether it "has been heard and finally decided by the Court within the meaning of section 13". It is very difficult to see how a matter, which *ex hypothesi* was not before the former Court could

(1) (1897) I. L. R. 24 Calc. 711.

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and 1309. The defendant was undoubtedly a loser by indigo cultivation in these years.

The finding of the lower Court as to the next period, *i.e.*, 1310 and 1311, is not equally sound. The evidence is as conflicting as that adduced with regard to the previous period. The defendant admittedly had ceased to cultivate and manufacture indigo and a decree for possession had already been passed against him in favour of the plaintiff. There was, however, no reason why, unlike other indigo-planters, he would give up *khas* possession. The probabilities are against his case of letting out the land on money-rent. The lower Court has not analysed the evidence on this point and we are disposed to agree with the Commissioner in his estimate of the oral evidence. No leases or *kabuliats* have been produced to support the defendant's case of occupation by tenants. The tenants examined do not even produce their rent-receipts. In our opinion, therefore, the defendant was in *khas* possession during the years 1310 and 1311 and himself used the land for the cultivation of ordinary country-crops.

But in the view of the law that we are disposed to take, it makes no difference whether the defendant cultivated the land with indigo in 1308 and 1309 and raised other crops during the last two years, when the land was in *khas* cultivation, or whether money rent was obtained therefrom during the second period. The land is *zerait* or proprietor's private land. It must have been used as such before 1291 F.S., when the Trikalpore Factory took a lease of it. We must assume that it was cultivated by the proprietor himself for raising ordinary country crops. From 1291 to 1304 F S. it was cultivated by the lease-holders themselves and was not treated as *raiyati* land. The cultivation with indigo in 1305 to 1309 F.S. is not inconsistent with the same inference. Moreover, the plaintiff has been in direct occupation, since he took possession in execution of his decree, and he too has been cultivating the land with ordinary crops. The character of the land and its use for a long series of years, including the use since 1311 F.S., can lead to one conclusion only, viz, that the plaintiff, if he had been in possession, would have used the land for cultivating it himself with ordinary food crops. He is not an indigo-planter and would not have cultivated

The order of dismissal was in these terms :—" The plaintiff's pleader applies for withdrawing the suit. Withdrawal permitted, the suit being dismissed. The application for withdrawal was filed before delivery of judgment."

The defendants Nos 1 to 4 only contested the present suit, and the rest did not enter appearance at all. The defence was that the plaintiff had no title, and that the defendants were the *jagirdars* themselves.

The Court of first instance decreed the plaintiff's suit and the District Judge on appeal affirmed that decree

The defendants preferred a second appeal to the High Court on the ground, amongst others, that the Court below was wrong in holding that the plaintiff could bring a fresh suit for arrears of rent for the years 1308 and 1309, although his claim for that period had been previously dismissed as found by that Court.

Babu Gananda Charan Sen, for the appellants. The claim for the arrears of rent for the years 1308 and 1309 is barred under s. 373 of the Code of Civil Procedure, a previous suit in respect of the arrears for those years having already been dismissed without reserving to the plaintiff any liberty to institute a fresh suit. Act X of 1859 is not a complete Code, and the provisions of s. 373 of the Civil Procedure Code are, therefore, applicable to suits brought under that Act : see *Nilmoni Singh Deo* v. *Taranath Mukerjee* (1), *Sadai Naik* v. *Serai Naik* (2) and *Hare Krishna Mahanti* v. *Bishun Chandra Mahanti* (3).

Babu Prorash Chunder Mitter, for the respondents. The cases of *Mokunda Bullav Kar* v. *Bhagaban Chunder Das* (4) and *Radha Madhub Santra* v. *Lukhi Narain Roy Chowdhry* (5) are conclusive on the point. The Full Bench case of *Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (6) shews that Act X of 1859 has all along been treated as a Code complete by itself. The cases cited by the other side do not touch the point and they are distinguishable. It is submitted that Act X of 1859 being a complete Code,

(1) (1882) I. L. R. 9 Calc. 295.
(2) (1901) I. L. R. 28 Calc. 532, 537.
(3) (1908) 7 C. L. J. 420.
(4) (1894) I. L. R. 21 Calc. 514.
(5) (1893) I. L. R. 21 Calc. 428.
(6) (1891) I. L. R. 18 Calc. 368.

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In the present case, the plaintiff himself let out the land at Rs. 5 a bigha, and this is some evidence as to what the ordinary rate is and it might be taken to be competition rate of rents practically equivalent to the nett produce of land. The plaintiff, however, was then out of possession. If a proprietor, who has been in direct possession of his private land, and knows what average nett produce it yields, leases it to a tenant, reserving the right, as he has a right by law, to re-enter at the end of any agricultural year, we may fairly assume that the rent is a rack rent and equivalent, as nearly as may be, to nett produce. If the proprietor was not in direct possession before such a lease, and had no special knowledge of the nett produce, an allowance may be made in his favour. An allowance may, also, be made for the reactionary effect, which the prevalence of customary rent has on rent, which would otherwise be the full competition rent. That is to say, the pecuniary loss arising from the effect of the prevailing rate paid by *khudkasht* raiyats may be added so as to arrive at true competition rent on nett produce. In the present case, we have the fact of letting at Rs. 5 a bigha and the further fact that the plaintiff valued the land at Rs. 80 a bigha in the plaint, thus assessing the profit per bigha at Rs. 4, the ordinary market price being 20 years' purchase.

Although, theoretically, there should be an exact coincidence between competition rent and the value of nett produce, the divergence in the present case will be very great, if the conclusions arrived at in the Commissioner's report be correct. There ought not to be such a divergence, if, as we have held, the rent paid was not customary. The figures given by the Commissioner as to quantities of produce and the cost of production appear to us to be inaccurate. They are, respectively, over-estimated and under-estimated. It is in evidence and is an undeniable fact that the *zerait* lands in Tier were assessed in the leases to the Trikalpore Factory at Rs. 4 per bigha as rent and the plaintiff consequently valued each bigha at Rs. 80. We have no doubt, therefore, that the figures showing the nett produce as given in the Commissioner's report are highly exaggerated and we cannot accept them.

rents payable by the sikmi tenure-holders. It does not matter whether appellants have also a share as superior landlords or not. Appellants as tenure-holders cannot question the right or title of a registered proprietor :" and the finding with regard to the separate collection is—" The estate has been split up and the several co-sharers are collecting their shares of the rents separately. Defendant's agent admits that the Collector of Puri is collecting his share of the rents separately. This being the case, plaintiff was justified in suing for his share of the rents alone."

With regard to the second contention as to whether section 373 of the Civil Procedure Code has any application to suits under Act X of *1859*, we think the authorities, to which our attention has been invited on behalf of the appellants, are not in point. The case of *Nilmoni Singh Deo* v. *Taranath Mukerjee* (1) is one of the authorities relied upon by the appellants The question raised in that case was whether the Deputy Commissioner of Manbhum, who had made certain decrees in a rent suit under Act X of 1859, could transfer these decrees for execution to another district. The attention of their Lordships in that case was mainly directed to the question of transfer of decrees from the Court at Manbhum to another district, and the solution of this question depends upon the construction of the expression " Civil Courts " used in section 77 of Act X of 1859 and some other kindred sections It was held that the Rent Court is a Civil Court, in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and being a Civil Court in that sense, it comes within the provisions of Act VIII of 1859, which was the old Civil Procedure Code. It was decided that the Rent Court being a Civil Court under that Act, it had the power of transferring decrees for execution to another district.

The next authority referred to for the appellants is the case of *Sadai Naik* v. *Serai Naik and Matangini Dasi* (2). This case *deals with the question whether a second appeal would lie to this* Court from an appellate decree of the District Judge in a suit under Act X of 1859, which suit had been tried by a Deputy-Collector and the first cited decision of the Privy Council in

(1) (1882) I. L. R. 9 Calc. 295. (2) (1901) I. L. R. 28 Calc. 532.

APPELLATE CIVIL.

Before Sir Francis William Maclean, K.C.I.E., Chief Justice and Mr. Justice Doss.

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May 15.

BIRAJ MOHINEE DASEE
v.
KEDAR NATH KARMAKAR.*

Evidence—Petition—Compromise—Criminal proceedings—Value of such deed—Admissibility in evidence of such document in a later case.

An unregistered compromise petition, which was the root of the plaintiff's claim to an increased rent and was filed in previous criminal proceedings, was not incorporated in the Order in such proceedings,

Held, it was not admissible in evidence in a later civil suit.

Pranal Anni v. Lakshmi Anni(1), *Kali Charan Ghosal v. Ram Chandra Mandal*(2) and *Birbhadra Rath v. Kalpataru Panda*(3) referred to.

SECOND APPEAL by the plaintiff.

Biraj Mohinee Dasee brought the suit now in appeal for the recovery of arrears of rent of 4½ *arhis* of paddy per annum for the last two quarters of 1309 and for 1310. The defendant contended that the amount of rent was 1¾ *arhis* of paddy. In that suit, the plaintiff filed an unregistered *solenama*, by which the defendant agreed to hold the rented land from 1310 to 1318B.S., at a rental of 4½ *arhis* of paddy per annum.

The deed of compromise brought to an end a criminal case under s. 476 of the Indian Penal Code between the same parties and was filed in that case. The terms of the compromise were however not incorporated in the order passed in that criminal case. The defendant contended that the deed was not admissible in evidence. The Munsif, however, overruled the contention and decreed the suit.

On appeal, the Subordinate Judge reversed the decision of the Munsif, giving effect to the defendants' contention.

* Appeal from Appellate Decree, No. 518 of 1907, against the decree of Jogendra Nath Mookberji, Subordinate Judge of 24-Parganas, dated 30th November 1906, reversing the decree of Behari Lal Chatterjee, Munsif of Sealdah, dated 7th April, 1906.

(1) (1899) I. L. R. 22 Mad. 508; L. R. 26 I. A. 101.
(2) (1903) I. L. R. 30 Calc. 783.
(3) (1905) 1 C. L. J. 388.

rents payable by the *sikmi* tenure-holders. It does not matter whether appellants have also a share as superior landlords or not. Appellants as tenure-holders cannot question the right or title of a registered proprietor:" and the finding with regard to the separate collection is—"The estate has been split up and the several co-sharers are collecting their shares of the rents separately. Defendant's agent admits that the Collector of Puri is collecting his share of the rents separately. This being the case, plaintiff was justified in suing for his share of the rents alone."

With regard to the second contention as to whether section 373 of the Civil Procedure Code has any application to suits under Act X of 1859, we think the authorities, to which our attention has been invited on behalf of the appellants, are not in point. The case of *Nilmoni Singh Deo* v. *Taranath Mukerjee* (1) is one of the authorities relied upon by the appellants The question raised in that case was whether the Deputy Commissioner of Manbhum, who had made certain decrees in a rent suit under Act X of 1859, could transfer these decrees for execution to another district. The attention of their Lordships in that case was mainly directed to the question of transfer of decrees from the Court at Manbhum to another district, and the solution of this question depends upon the construction of the expression "Civil Courts" used in section 77 of Act X of 1859 and some other kindred sections It was held that the Rent Court is a Civil Court, in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and being a Civil Court in that sense, it comes within the provisions of Act VIII of 1859, which was the old Civil Procedure Code. It was decided that the Rent Court being a Civil Court under that Act, it had the power of transferring decrees for execution to another district.

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(1) (1882) I. L. R. 9 Calc. 295. (2) (1901) I. L. R. 28 Calc. 532.

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plaintiff says that, having regard to the terms of the *solenama* as contained in the petition, he is entitled to more, to which the defendant replies that the plaintiff cannot rely upon the petition, because it has not been registered and not having been registered, is not admissible in evidence. The petition, so far as is material, runs thus: "The disputed 1 bigha 15 cottahs of land, which has been in my possession from before will continue to be in my possession for nine years more, *i.e.*, from 1310 B. S. to 1318 B. S. After that the landlord will be able to make settlement of the land as he likes. For the said land I will give to Biraj Mohinee Dasee 4½ *arhis* of Gula paddy *annually*, and this *razinama* will be considered as *patta kabuliyat*. I will not therefore prosecute this case any further." The document defines the area of land, the rent to be paid, the duration in point of time of the tenancy, and the parties treated it as a *patta kabuliyat*. This document is the foundation of the plaintiff's title to the increased rent, and as the plaintiff must fall back upon the petition itself, that cannot, unless it is registered, affect the immoveable property comprised therein exceeding 100 rupees in value, or be receivable in evidence of the transaction affecting that property. If this petition had been filed in a civil proceeding, and the petition had been followed by an order or decree, which embodied, directly or indirectly, its terms, then it would not have been necessary to have had it registered. But this has not occurred in the present case, and as this document is the root of the plaintiff's claim to the increased rent, it ought to have been registered: and in the absence of registration it is not admissible in evidence. This view seems to be consistent with the Privy Council decision in *Pranal Anni* v. *Lakshmi Anni*(1), with the decision of this Court in *Kali Charan Ghosal* v. *Ram Chandra Mandal*(2) and with the principle involved in a more recent decision of this Court in *Birbhadra Rath* v. *Kalpataru Panda*(3).

The appeal, therefore, fails and must be dismissed with costs.

DOSS, J. I agree.

Appeal dismissed.

S. M.

(1) (1899) I. L. R. 22 Mad. 508.

(2) (1905) I. L. R. 30 Calc. 783.

(3) (1905) 1 C. L. J. 388.

view is amply supported by the judgment in *Sadai Naik* v. *Serai Naik*(1), following, as it does, the Full Bench decision in the Sudder Dewani Adalut in *Hallodhar Biswas* v *Mohesh Chunder Haldar*(2) and *Nilmoni Singh Deo* v. *Taranath Mukerjee*(3)." We would also cite in the same case the remarks of Mookerjee J: "In this view of the matter, it is unnecessary to deal at length with the first branch of the contention of the appellant, which raises the question, whether the proposition, that Act X of 1859 is a complete Code in the sense that no provision of the Code of Civil Procedure is applicable to proceedings thereunder, may not require to be qualified in view of the decision of the Judicial Committee in *Nilmoni Singh Deo* v. *Taranath Mukerjee*(3)."

On review of the cases we are of opinion that the provisions of section 373 of the Civil Procedure Code have no application to suits instituted under Act X of 1859; and, therefore, the plaintiff, that is, the present respondent, was not debarred from instituting a fresh suit with regard to rents for 1308 and 1309, notwithstanding the fact that he had not obtained distinct, permission to do so.

We have already observed that on the 30th January, 1903 an application was made by the plaintiff to withdraw from his suit, with liberty to institute a fresh suit, on which an order was passed on the same day giving permission to withdraw from the suit. Although nothing was said in that order as to the plaintiff's liberty to institute a fresh suit on the same cause of action, that order ought to be read along with the application, on which it was passed. In that application we find a distinct prayer to be allowed to withdraw from the suit with liberty to institute a fresh suit on the same cause of action, and the Deputy Collector appears to have taken particular care in noting that the application for withdrawal was filed before delivery of judgment, that is to say, before the order of dismissal was passed.

In these circumstances, the judgment of the lower Appellate Court is correct, and we therefore dismiss this appeal with costs.

Appeal dismissed.

B. D. B.

(1) (1901) I. L. R. 28 Calc. 532. (2) (1861) S. D. A. 144.
(3) (1882) I. L. R. 9 Calc. 295.

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The suits were held to be not maintainable. On appeal, the Subordinate Judge confirmed the decision of the Munsif.

Defendant No. 1 alone contested the suits and the appeals.

Babu Surendra Chandra Sen for the appellants. Section 103B merely raises a presumption of correctness, which is rebuttable, and the present suit is maintainable to show that the entry is wrong. Further the plaintiffs claim that the lands in suit do not form any part of the *zemindari* and that the Settlement Officer therefore had no jurisdiction to entertain the application under s. 105. No doubt he could have proceeded under s. 106. The omission to apply under that section does not bar my right to bring a regular suit in the Civil Court. I rely on *Ramjan Ali* v. *Amjad Ali*(1), *Ramgulam Singh* v. *Bishnu Pargash Narain*(2), *Troylokhyanath Bose* v. *Macleod*(3) and *Shambhu Chandra Hazra* v. *Purna Chandra Pal*(4).

Hon'ble Dr. Rash Behary Ghose (for the respondent) during the course of the arguments for the appellant pointed out that when jurisdiction is conferred on a special Court by Statute, that Court alone can investigate into the matter. They should have proceeded under s. 106: *Bhandi Singh* v. *Ramadhin Rai*(5).

Cur. adv. vult.

MACLEAN C. J. This is a suit for the alteration and correction of certain entries made in the record-of-rights published under Chapter X of the Bengal Tenancy Act. The real question is, whether the plaintiffs are entitled to maintain the suit. Both the Munsif and the Subordinate Judge have held that the suit is not maintainable and that the plaintiffs should have pursued the special remedy, which is given them, either under section 106 or under section 108 of the Bengal Tenancy Act. They have not done so.

It appears that at the instance of defendant No. 1 a survey was made and a record-of-rights prepared by a duly appointed

(1) (1893) I. L. R. 20 Calc 903.
(2) (1906) 11 C. W. N. 48.
(3) (1900) I. L. R. 28 Calc. 28.
(4) (1907) I. L. R. 35 Calc. 176.
(5) (1905) 2 C. L. J. 359.

The learned Subordinate Judge holding that Art. 120 and not Art. 109 of the Limitation Act governed the case gave the plaintiff a decree for the amount due for the whole period that the defendants were in possession. On appeal the District Judge confirmed the decree of the first Court.

The defendants appealed to the High Court.

Dr. Rash Behari Ghose and *Babu Hari Charan Sarkel* for the appellant.

Babu Nilmadhub Bose, *Babu Surendro Nath Guha* and *Babu Atul Krishna Roy* for the respondent.

MITRA AND BELL JJ. The plaintiff was the owner of a *patni mehal* under the Maharaja of Burdwan. The *mehal* was sold under Regulation VIII of 1819 for arrears of rent for the year 1306 and was purchased by the first defendant. The sale took place on the 18th May 1900. Afterwards, the first defendant transferred the property to the second defendant, his wife. The plaintiff instituted a suit for setting aside the *patni* sale and obtained a decree for possession on the 27th February 1901. He took possession on the 11th September 1901. During the period between the 18th May 1900 and the 11th September 1901, the defendants, or, either of them, were in possession of the *patni* property. The plaintiff instituted the present suit for *mesne* profits for the period during which the defendants were in possession, namely, from 18th May 1900 to 11th September 1901.

It is admitted that the claim for the amount, if any, recovered by the defendants or either of them within three years of 6th April 1904 (the date of the institution of the suit) is not barred by limitation.

The question argued in the lower Courts and also before us is, whether or not the claim for *mesne* profits for the period before three years of the institution of the suit, *i.e.*, the period from 18th May 1900 to 5th April 1901, is barred by limitation. The lower Courts were of opinion that Art. 120 of the Second Schedule of the Limitation Act applied to the case and not Art. 109 of the same Schedule, as contended for by the defendants. In support

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BOSE J.

that the Revenue Officer may, subject to such rules as the Local Government may prescribe in this behalf, transfer any particular case or class of cases to a competent Civil Court for trial.' If, in addition to, or in lieu of, the special remedy prescribed by section 105, a regular suit may be brought in a Civil Court for the same purpose, it is difficult to appreciate the utility of a provision, which empowers the Revenue Officer to transfer a case to a competent Civil Court for trial.

Appeal dismissed.

S. K.

The learned Subordinate Judge holding that Art. 120 and not Art. 109 of the Limitation Act governed the case gave the plaintiff a decree for the amount due for the whole period that the defendants were in possession. On appeal the District Judge confirmed the decree of the first Court.

The defendants appealed to the High Court.

Dr. Rash Behari Ghose and *Babu Hari Charan Sarkel* for the appellant.

Babu Nilmadhub Bose, Babu Surendro Nath Guha and *Babu Atul Krishna Roy* for the respondent.

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institution of the suit, to the date of recovery of possession, and that the utmost they could recover in execution, was *wasilat* up to the date of the institution of the suit.

The Subordinate Judge construed the decree as one in favour of the decree-holder without doubt, and awarded *wasilat* up to the date of the recovery of possession.

Mr. Sinha, Babu Bidhu Bhusan Ganguli and *Babu Benode Behari Mukherji* for the appellants.

Babu Nil Madhab Basu, Babu Surendra Chandra Sen, Babu Shib Chandra Palit and *Babu Amar Nath Basu* with him for the respondents.

MACLEAN C.J. The question, which arises on this appeal, is as to the amount of mesne-profits, to which the successful plaintiffs in the suit are entitled. The suit was one for recovery of possession, and for recovery of mesne-profits, up to the date of the institution of the suits and afterwards from the date of suit to the date of recovery of possession on enquiry. The suit was instituted on the 7th of May 1887, and the decree was passed on the 20th February 1890: and it was decreed that the mesne-profits due to the plaintiffs be ascertained in execution of the decree. The decree was appealed from, and was affirmed by the High Court on the 25th of July 1898. Then there arose a question as to the amount of mesne-profits, to which the plaintiffs were entitled. The matter has been enquired into in the Court below and they have given mesne-profits from May 1884, the date of dispossession, up to the 16th of June 1906, when they were restored to possession. The judgment-debtors contend that that is wrong, and that having regard to section 211 of the Code of Civil Procedure, they can only be allowed mesne-profits for three years from the date of the decree of this Court, namely, the 25th of July 1898. No other question has been raised and no question has been raised as to the propriety of the order giving mesne-profits from May 1884 up to the date of the decree, and the only question is that, which I have stated.

when the profits are *actually* received. We do not see any way of getting over a construction, which is patent from the words used in Art. 109. Art. 120 does not therefore apply, but Art. 109 is clearly applicable.

In *Krishnanand* v. *Kunwar Partab Narain Singh* (1) a contention similar to the one before us was raised before the Judicial Committee of the Privy Council. It was contended that, when the settlement officer gave possession to a person, the possession was not that of a trespasser and it was not wrongful within the meaning of Art. 109. The Judicial Committee observed, quoting the words of Art. 109, that the argument could not be supported and the point was practically abandoned by the learned counsel, who argued the case. We are, therefore, of opinion that the decree of the lower appellate Court should be set aside.

But then remains the question, whether we should remand the case for a finding as to the amount payable by the defendants to the plaintiff for the period between the 6th April 1901 and the 11th September 1901 It appears from the Commissioner's report that the sum of Rs. 377-7-8 was realized by one Jadab as gomastha of the defendants for the period from Falgun 1307 to 31st Sraban 1308. It does not appear that the defendants or any of them realized any further sum. The liability of the defendant should be less than the um of Rs. 377-7-0. But the learned counsel for the defendants has no objection to a decree being passed in favour of the plaintiff for this sum, preferring it to the harassment of a continuation of the litigation for a smaller amount. We, therefore, direct that, in lieu of the decree passed by the lower appellate Court, a decree be entered in favour of the plaintiff for the sum of Rs. 377-7-8. We direct that the appellant do get the costs of this appeal, as well as the costs incurred by him in the lower Courts, in proportion to the claim dismissed.

(1) (1891) I. L. R. 10 Calc 785.

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1895" (that was the date when the decree was eventually affirmed) "and (see section 211 of the Code) for a further period not exceeding three years until recovery of possession."

There are two clear authorities in the Bombay High Court in favour of the above view, one the case of *Uttamram* v. *Kishordas*(1) and the other of *Narayan Govind Manik* v. *Sono Sadashiv*(2). No authority to the contrary has been cited.

The contention of the appellants must prevail, and the order of the Court below must be varied by directing that the plaintiffs are only entitled to mesne-profits for three years from the date of the decree, namely, the 25th of July 1898. The other part of the order, namely, that for mesne-profits up to the date of the decree, is not affected by our present order and will stand unreversed.

The appellants must have the costs of this appeal.

Doss J. I agree.

Appeal decreed.

S. M.

(1) (1899) I. L. R. 24 Bom. 149. (2) (1899) I. L. R. 24 Bom. 345.

basis of rent for the first two years and on the basis of produce for the subsequent years with interest at 12 per cent per annum amounted to Rs. 12,805. The defendant contended that mesne profits should be assessed on the basis of rent for the entire period; the amount with interest on the rental basis was found to be Rs. 3,192; the Subordinate Judge ordered the latter sum to be paid to the plaintiff with costs and subsequent interest at 6 per cent. per annum. The plaintiff appealed and the main contentions before the High Court were based on the rival principles of calculation namely, whether the mesne profits should be calculated on the rental or produce basis

Dr. Rash Behari Ghosh and *Babu Lachmi Narain Singh* for the appellant.

Moulavi Syed Shamsul Huda and *Moulavi Syed Mahomed Tahir* for the respondent.

MITRA AND CASPERSZ JJ The plaintiff appellant obtained on the 29th July 1902, a decree against the defendant respondent for recovery of possession of 69 bighas and 15 cottas of land in Mehal Tier as *malik's zerait* or proprietor's private land, with mesne profits. The claim for mesne profits covered the periods from the 18th February 1898 to the date of the institution of the suit, *i e*, the 30th January 1901 and from the date of the institution of the suit to the date of delivery of possession. namely, the 31st May, 1904. The decree directed that mesne profits should be ascertained in the execution proceedings The land was not only *Malik's Zerait*, but it was alleged to have been in the *khas* or direct possession of the defendant himself, and the decree directed delivery of *khas* possession by dispossessing the defendant. The defendant appealed to this Court from the decree of the lower Court. On the 10th March 1905, this Court affirmed the decree of the lower Court. Possession, however, had, in the meantime, been taken, as we have said, on the 31st May 1904.

There is no dispute as to the amount of mesne profits for the years 1305 to 1307 F. S. The plaintiff's claim for these years was based on rental, which was realisable from *raiyats*, to whom

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Babu Dwarka Nath Mitter, and *Babu Sailendro Nath Palit*, for the appellants.

Moulavi Mahomed Mustafa Khan for the respondents.

MITRA AND BELL JJ. The suit has been dismissed on the ground that the notices required to be served under section 30 of the Civil Procedure Code were not served, nor was any advertisement published. We find, however, that the defendants in their written statement gave the names of the tenants interested in the piece of water, which was the subject matter of dispute on the question of irrigation of the land of the plaintiffs.

We are of opinion that the suit should not have been dismissed on the ground stated in the judgment of the lower Appellate Court. The plaintiffs asked for permission in the plaint and, though there was no express order granting it, it should be presumed that it had been granted, because the plaint was admitted and registered. It was the duty of the Court to cause service of notices or cause an advertisement to be published.

The plaintiff's suit should not have been dismissed for the failure of the Court to perform the duties imposed upon it by section 30 of the Civil Procedure Code. All that the plaintiffs were guilty of was that they did not move the Court as they should have done. The case must, therefore, be remanded to the lower Appellate Court for the proceedings being commenced *de novo* from the stage of the admission and registration of the suit with liberty to it to send it to the first Court. The notices required by section 30 must now be served or an advertisement published The dismissal of the suit on the ground stated in the judgment of the lower appellate Court can, under no circumstances, be justified. We order accordingly and direct that each party do bear his or their own costs in the lower Courts as well as in this Court.

Appeal allowed.

S. C. B.

1309F. S., and was a loser by that cultivation, and that, in the following years, he let out the lands on money-rent. The Commissioner, however, had come to a different conclusion. The oral evidence adduced before the Commissioner was highly conflicting, because the witnesses of each party supported its own case. The Commissioner himself hesitated as to the weight to be attached to such conflicting testimony, but the scale, in his estimate, turned in favour of the plaintiff on account of a statement, or detailed account of produce filed by the defendant himself with his petition of objection. That statement, however, was not a part of the petition and it does not contain any direct or unequivocal admission that the lands were sown with ordinary crops during 1308 and 1309. We, therefore, are not disposed to place much reliance on this statement. On the other hand, the land had been used for a long series of years for indigo cultivation. It was so used from 1291 to 1297 and again from 1298 to 1304, periods during which the Trikalpore Factory held it on lease with the rest of the lands of Mehal Tier. The factory did not stop work during 1308 and 1309. The defendant sold indigo in those years through the Calcutta indigo brokers, Messrs. Thomas & Co. The discovery of synthetic indigo dye in Europe could not, in the years previous to 1308, lead to any necessary inference of a permanent decline in the price of Bengal indigo and it is more probable that the defendant used the land for indigo cultivation for supplying his factory with materials for manufacturing indigo. The evidence to show that the indigo despatched by the defendant to the market of Messrs. Thomas & Co. was partly indigo from the land in suit is no doubt not very complete, but the probabilities are in favour of the view that the defendant did not allow the land to go out of indigo cultivation as long as he had occupation of it and as long as he continued work at the factory at Trikalpore. The land was, in fact, indigo land for nearly twenty years. The plaintiff is now in possession of the village and it is easy for him to produce a number of raiyats as witnesses to support his case. The defendant labours under the disadvantage, which dispossession always brings with it. Weighing, therefore, the entire evidence, we come to the same conclusion as the lower Court with respect to the years 1309

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other witnesses were going to be called, namely the defendant himself and Mukhy Singh. On April 30th, as these two witnesses had not arrived in Court, defendant's Counsel applied for an adjournment, which was granted till the following day. On May 1st, Counsel for the defendant applied for a further adjournment, which was refused as sufficient grounds were not made out. Thereupon Counsel for the defendant expressed his desire to withdraw from the suit, and did so. Upon that, Counsel for the plaintiff addressed the Court on the whole evidence, and the Court decided the case upon its merits.

It was this decree, which the defendant now submitted was an *ex-parte* one, and applied to have set aside.

Mr. Chakravarti (*Mr. Lahiri* with him) for the defendant. Although the defendant appeared through Counsel at the earlier stages of the case, on May 1st, which was the day fixed for an adjourned hearing, there was merely an application by Counsel for a further adjournment, which was refused, and thereupon Counsel withdrew from the suit. Such an application was not an "appearance." See *Satish Chandra Mukerjee* v. *Ahara Prosad Mukerjee*(1). An appeal from a decree passed in the circumstances of this case would not be the proper remedy, as an appeal implies an error in the Court of first instance, and no such error can be said to have been committed here. Section 108 of the Code applies to every case, in which a decree is passed *ex-parte* against a defendant under section 157, by reason of his non-appearance at an adjourned hearing. See *Jonardan Dobey* v. *Ramdhone Singh*(2). The two elements contemplated by section 157 are (*i*) that the original suit be pending, and (*ii*) that one or other of the parties do not appear. From the moment of withdrawal of Counsel from the suit on May 1st there was no appearance on behalf of the defendant and section 157 became applicable See *Mariannissa* v. *Ramkalpa Gorain*(3) and *Cooke* v. *The Equitable Coal Co. Ld* (4). Where a suit is part-heard and is adjourned and a party does not appear at the adjourned date of hearing, the proper procedure

(1) (1907) I L. R. 34 Calc. 403.
(2) (1896) I. L. R. 23 Calc. 738.
(3) (1904) 8 C. W. N. 621.
(4) (1907) I. L. R. 34 Calc. 235.

indigo. It is undoubtedly more profitable to cultivate one's own land than allow *raiyats* to be in occupation on payment of customary rent. The fact that the plaintiff gave leases to tenants for three years, from 1305 to 1307 F.S., during the time of dispossession by the defendant, cannot weaken the inference that the plaintiff, if he had been in possession, would have used the land as *sir* or *zerait* by cultivating it himself. The intention of the plaintiff must be presumed. He is the potential cultivator according to the principle expounded in the case of *Ijdtulla* v. *Chandra Mohan Banerjee* (1). If the defendant used the land to suit his own fancy, if he did not use it in the most advantageous way, if he took the risk of cultivating it with indigo on the chance of getting high profits by manufacturing indigo, or if he adopted the more comfortable use of land by letting it to tenants and was satisfied with a comparatively small income, the plaintiff ought not to be a loser thereby. He must not suffer for the indolent or speculative conduct of a trespasser. *Surja Pershad Narain Singh* v. *Reid* (2) and *Laljee Shahay Singh* v. *Walker* (3) relied on by the Lower Court do not lay down a different rule. The character of the possession before trespass by the defendant should be ascertained to arrive at the true measure of damages, because such possession is a fair index of intention as to the mode of occupation, if there were no trespass. *Gopal Chandra Mandal* v. *Bhooban Mohan Chatterjee* (4) lays down the same principle of ascertaining the intention of the true owner and the potential position he occupies. In *Ijatulla Bhuyan* v. *Chandra Mohan Banerjee*(1) we held that as regards *zerait* land, mesne profits should be assessed on the basis of produce and not on the basis of rent. The present is a parallel case and we see no reason to lay down a different rule. We are, therefore, of opinion that the principle of assessment of damages adopted by the Lower Court is erroneous. It should not have assessed damages on a rental basis.

The next question is one of fact; what is the amount payable by the defendant to the plaintiff for the years 1308 to 1311 F.S.,

(1) (1907) 12 C. W. N. 285.
(2) (1902) I. L. R. 29 Calc. 622.
(3) (1902) 6 C. W. N. 732.
(4) (1903) I. L. R. 30 Calc. 536.

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WOODROFFE J.

the suit by his Counsel. The suit continued throughout that day and on the 27th, 28th and 29th further evidence was given on behalf of the plaintiff. The case for the plaintiff was closed on the 29th and on that day the defendant entered on his defence, read the evidence of several witnesses taken on commission and examined two witnesses Jawaran Panday and Yam Venkat Subra Chetty and tendered documentary evidence. It was understood that two other witnesses were going to be called, namely the defendant himself and his cousin Mukhy Sing. On the 30th April, however, these two persons had not arrived at Court and learned Counsel, who appeared for the defendant, thereupon applied for an adjournment of the suit, as he understood they were coming. He stated that they were expected, that telegrams had passed and that he did not know why they had not appeared, and that being the case, he suggested some accident or other similar cause might have prevented their appearance that day. I adjourned the case till the following day directing the defendant to pay the costs occasioned by the adjournment. The adjournment was made for two purposes, first to enable the defendant to produce those two witnesses, namely, the defendant himself and his cousin Mukhy Sing, and I also said that in the event of these two persons not being produced on the following day, any further application for adjournment must be supported by proper materials.

On the 1st May the case was called on and learned Counsel then applied for a further adjournment of the case. I was not satisfied that grounds had been made out for an adjournment and I refused the adjournment for the reasons given in my judgment of that day. Learned Counsel, after the judgment was delivered, asked for an opportunity to send a man to Bilaspore; this I refused as I had already dealt with the question of adjournment. I then asked learned Counsel, whether he wished to address me on the case, and he stated, he wished to withdraw from the suit, and he did so. Upon that I heard learned Counsel for the plaintiff, who addressed me on the whole evidence and I decided the case upon its merits.

It is said that under these circumstances there has been an *ex-parte* decree, and that, though the defendant appeared and

How then are we to assess the mesne profits? We do not think it desirable to send the case back. The parties have already ncurred heavy costs in the investigation and the case itself has been long pending. We do not also expect that any further evidence of a reliable character would be available, if we were to remand the case for another enquiry by the lower Court. Materials for determining the nett produce, or what would be the true competition rent, must inevitably be meagre or unsatisfactory. We do not therefore think any useful purpose would be served by remand. We think it desirable to come to our own conclusions on the materials on the record.

Thirty-three and a third per cent. appears to us to be a fair margin for the risk and profit reserved to the tenants, who took leases from the plaintiff from 1305 to 1307 at Rs. 5 per bigha. We do not think the plaintiff settled the *zerait* land by giving up more than 33⅓ per centum out of the nett produce. He might have conceded less, but the defendant is a wrong-doer and every presumption should be made against him. As it is, the result we arrive at is less than one half of that calculated with so much wealth of detail by the Commissioner, the ratio being $\frac{4}{9}$-ths.

We are, therefore, of opinion that the basis of the award made by the Court below should be increased by one-third, and the decree modified accordingly The rate of interest at 12 per cent. per annum will stand.

As regards costs, the defendant should pay the entire cost of the investigation by the Commissioner and of the trial by the lower Court. We make no order as to costs of this Court.

S. C. B.

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

NARSING PRASAD SINGH
v.
EMPEROR.*

1908
June 22.

Act XIII of 1859, ss. 2 and 5—Contract—Criminal breach of contract—Workmen—Imprisonment—Effect of extension of the Act beyond the Presidency towns—Liability to repay money after the expiry of the term of the contract.

The effect of s. 5 of Act XIII of 1859 is to extend the whole of its provisions to the place where it is declared to be in force, and a master or employer resident or carrying on business at such place has the same rights as are conferred on masters or employers resident or carrying on business in a Presidency town.

Per STEPHEN J. The expiration of the term of the contract does not deprive the complainant of his right to ask for the repayment of the money advanced by him.

Queen-Empress v. *Konda*(1) followed. *Khoda Buksh* v. *Moti Lal Johori* (2) dissented from.

Per HOLMWOOD J. *contra*. The complainant cannot exercise an option to recover the amount advanced after the expiry of the contract. *In re Chikka Putta* (3), *In re Matha Goundan* (4), *In re Bellay* (5) and *Khoda Buksh* v. *Moti Lal Johori* (2), followed.

ONE Narwanji Prasad Singh, a brick-contractor, carrying on business at Shahpur in the district of the 24-Parganas, complained against the petitioners under section 1 of Act XIII of 1859, on the 5th March last, alleging that he had contracted with them verbally in the Patna district for service as labourers in his Shahpur brickfields till the 31st May 1908, and had paid them various sums in advance on account of work to be done by them, but that they had wilfully and without lawful or reasonable excuse neglected to perform the same according to the terms of the contract.

* Criminal Miscellaneous Revision, No. 75 of 1908, against the order passed by L. Birley, Officiating District Magistrate of Alipore, dated the 11th May, 1908.

(1) (1893) I. L. R. 16 Mad. 347.
(2) (1906) 11 C. W. N. 247.
(3) (1884) 1 Weir. 704.
(4) (1884) 1 Weir. 705.
(5) (1884) 1 Weir. 706.

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BIRAJ MOHINEE DASEE v. KEDAR NATH KARMAKAR.
MACLEAN C.J.

Babu Gunada Charan Sen for the appellant. The compromise deed formed part of judicial proceedings. As such, registration was not necessary: *Bindesri Naik* v. *Ganga Saran Sahu*(1). The case of *Syed Sufdar Reza* v. *Amzad Ali*(2), on which the judgment of the Court below is based, does not lay down that registration of such deed is compulsory. That case rather supports my contention. The compromise petition is not a lease. See *Satyesh Chunder Sircar* v. *Dhunpul Singh*(3) and *Obai Goundan* v. *Ramalinga Ayyar*(4). The case of *Pranal Anni* v. *Lakshmi Anni*(5) has no application here.

Babu Manmatha Nath Mukherji for the respondent. The last case cited by the appellant (5) supports my case. See also *Kali Charan Ghosa* v. *Ram Chandra Mandal*(6). The petition purported to be a lease and registration was necessary for it to have any force. See *Gurdeo Singh* v. *Chandrikah Singh*(7).

Babu Gunada Charan Sen in reply. The fact that the previous case was a criminal proceeding should not affect the question and take the matter out of the rule laid down in *Bindesri Naik* v. *Ganga Charan Sahu*(1). See *Gobinda Chandra Paul* v. *Dwarka Nath Paul*(8).

MACLEAN C. J. The only question on this appeal is whether a petition, which was filed in certain criminal proceedings between the present plaintiff and defendant, is admissible in evidence, when it has not been registered. There was some dispute between the parties, which resulted in criminal proceedings and the petition in question was presented in those proceedings; and in consequence they were withdrawn, but no order was passed incorporating the terms of the petition. The question in the present suit is, as to the amount of rent payable by the defendant to the plaintiff. It is a rent suit. As to the rent payable before the date of the petition there is no question and a decree has been passed in the plaintiff's favour in respect of that rent. But the

(1) (1897) I. L. R. 20 All. 171; L. R. 25 I. A. 9.
(2) (1881) I. L. R. 7 Calc. 703.
(3) (1896) I. L. R. 24 Calc. 20.
(4) (1898) I. L. R. 23 Mad. 217.
(5) (1899) I. L. R. 22 Mad. 508; L. R. 26 I. A. 101.
(6) (1903) I. L. R. 30 Calc. 783.
(7) (1907) 5 C. L. J. 611.
(8) (1908) 12 C. W. N. 849.

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STEPHEN J.

work that they contracted to perform, and that they subsequently wilfully and without lawful or reasonable excuse refused to perform it. A complaint was accordingly made against them by Narwanji Prasad under section 1 of Act XIII of 1859 on the 5th March 1908, and the case was transferred to a Deputy Magistrate, who made an order against one of the persons charged, with which we are not at present concerned. A Rule has now been granted calling on the District Magistrate of the 24-Parganas to show cause why the proceedings against the other persons, who contracted to serve Narwanji Prasad, should not be quashed as being without jurisdiction. The Magistrate considers that there is no objection to the jurisdiction of the trying Court, but also offers no objection to the proceedings being quashed, as he considers it probable that the case has been falsely instituted at the instance of the petitioner's zemindar. We have, however, heard counsel on behalf of the complainant, which I consider was the correct procedure, as the present proceedings are in fact undertaken to enforce his civil right.

The argument in favour of the Rule to show that the Magistrate has no jurisdiction is two-fold. That which goes more to the root of the matter is that, as the complainant does not reside or carry on business in a Presidency town, he cannot claim any remedy under the Act. An argument of more restricted scope is that, as the term of the contract has now expired, the complainant's remedy is gone.

The first argument may be stated thus. The Act confers on certain persons, namely masters and employers residing or carrying on business in any Presidency town, the privilege of enforcing their civil rights by a penal remedy enforceable by criminal procedure. The workman, or the place where he contracts to do his work, may be anywhere, but the remedy is to be sought from a Magistrate of Police, which means a Presidency Magistrate. When the Act is extended by section 5 the only effect of the extension is to enable officers specially appointed to exercise the functions of a Magistrate of Police, and the privilege of persons residing or carrying on business in a Presidency town is not extended to any one else. I cannot agree with this argument. The curious effect attributed, and as it seems to me rightly

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Doss.

JOGENDRA NATH RAY

v.

KRISHNA PRAMADA DASEE.*

1908
April 6.

Bengal Tenancy Act (VIII of 1885), ss. 106, 108—Suit in Civil Court, if maintainable, for alteration of entry published.

A suit in the Civil Court for the alteration and correction of certain entries made in the record-of-rights published under Chapter X of the Bengal Tenancy Act is not maintainable.

SECOND APPEAL by the plaintiffs.

Krishna Pramada Dasee, defendant No. 1, in the suits out of which this appeal has arisen, as *zemindar—patnidar* applied under s. 101(2) (*a*) of the Bengal Tenancy Act, for a survey of all her lands situated in several villages appertaining to the estate bearing *Tauzi* No. 72—1, *Pargana* Dantia and for a preparation of a record-of-rights with respect to those lands.

During the settlement proceedings, the plaintiffs claimed certain villages situated in Sarulia, one of the villages mentioned in the notification of the *Calcutta Gazette*, to be held rent-free, which the Settlement Officer had entered in the record as included in the *mal* lands of defendant No. 1. The objection of the plaintiffs was heard and decided under s. 103A by the Settlement Officer against them. Entries were accordingly made in the finally published record. Defendant No. 1 thereupon applied, under s 105, for settlement of a fair and equitable rent in respect of those lands, and the Settlement Officer did so settle them, rejecting the plaintiff's prayer for stay of proceedings, until the disposal of the present suits for alteration and correction of the entries on establishment of their title as *lakhirajdars*.

* Appeal from Appellate Decrees, Nos. 1172 of 1906, etc., against the decrees of Poorna Chandra Ghosh, Subordinate Judge of Khulna, dated the 29th March 1906, affirming the decrees of Hem Chandra Mitra, Munsif of Satkhira, dated the 15th of August 1905.

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STEPHEN J.

In re Chikka Putta(1), *In re Matha Goundan*(2), *In re Bettay*(3), and the same view was recently taken by this Court in *Khoda Buksh* v. *Moti Lal Johori*(4). The reason for this I suppose to be that, after the term of the contract has expired, the workman cannot perform his contract "according to the terms of his contract." But I cannot see why the expiration of the term of the contract should deprive the complainant of his right to exercise his option of asking for the recovery of the money he advanced. The option between the two remedies is that of the complainant, and not of the person complained against, and the fact that one remedy would be infructuous does not seem to me to deprive him of the other. I consider that the complainant's right to recover the money he has advanced continues, till it is repaid to him, subject to the effect of the Limitation Act, of which there is no question here. This seems to me to be so particularly when, as is the case here, the complainant instituted proceedings at a time when both remedies were open to him, and it is only this Rule that has prevented him from exercising his option. This view is in agreement with that of the Madras High Court in *Queen-Empress* v. *Konda* (5), but the decision in *Khoda Buksh* v. *Moti Lal Johori*(4) seems to me to be a direct authority the other way. It is there laid down that, where the term of the contract has expired, "the contract cannot be specifically enforced" or "the money recovered." I must respectfully dissent from this view, but I do not consider the decision as *obiter*. Owing to the view taken by my learned brother the case cannot be referred to a Full Bench, and I have, therefore, no choice but to follow this decision. I, therefore, agree that the Rule must be made absolute.

HOLMWOOD J. I think this Rule should be made absolute. It is unnecessary to recapitulate the facts, which are sufficiently set out in the judgment of my learned brother.

In my opinion the remedies under section 2 of Act XIII of 1859 are interlocked and interdependent, and if one has lapsed, the other has lapsed also.

(1) (1884) 1 Weir. 704.
(2) (1884) 1 Weir. 705.
(3) (1884) 1 Weir. 706.
(4) (1906) 11 C. W. N. 247.
(5) (1893) I. L. R. 16 Mad. 347.

Settlement Officer,* in respect of all lands situated in village Sarulia. In the course of the settlement proceedings, the plaintiffs claimed certain lands as rent-free and certain other lands as included in their zemindari, which the Settlement Officer had recorded as forming part of defendant No. 1's zemindari. Both these objections were heard by the Settlement Officer, and the plaintiff's claims were not successful. Entries were then made in the finally published record-of-rights, and defendant No. 1 on the basis of such entries applied, within two months, for the settlement of a fair and equitable rent. Then the plaintiffs instituted the present suit. The question is whether the suit will or will not lie. The Bengal Tenancy Act was passed nearly a quarter of a century ago, but no authority has been produced before us to show that the suit will lie. This portion of the Act deals with a special matter—the settlement by the Revenue authority of the record-of-rights and a special procedure is provided for challenging the decision of the Revenue Officer. Presumably the proper course for the plaintiffs would have been to have instituted a suit under section 106, and under section 108; on their application, the Revenue Officer could have revised his decision under section 105, 106 or 107 of the Act. But neither of these courses was taken. I agree with both Courts that the present suit does not lie: and I think that the appeals must be dismissed with costs.

DOSS J. I agree. I desire to add a few words. Section 106 of the Bengal Tenancy Act has been amended by Act III of 1898, and by that Act much wider powers have been conferred on the Revenue Officer than what he had under the original section as it stood before its amendment. Under section 106 as amended, the Revenue Officer has power to hear and decide, amongst several other things, any dispute between the landlords of neighbouring estates That implies that the Revenue Officer has power to decide questions relating to boundaries, for the purpose of preparing the record-of-rights. That being so, it is difficult to see how a regular suit can be brought in the Civil Court for the same purpose.

Moreover, the provision contained in the second paragraph of section 106 points to the same conclusion. It runs thus "Provided

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HOLMWOOD J.

of the proceedings. We have heard the learned counsel for the complainant very fully, and the impression left on my mind was that these cases are now being pursued to secure the punishment of the accused, and not to secure the legal remedies under the Act.

There is ample authority for holding that the enforcement of the contract cannot be asked for after the time fixed has expired. *vide*, *In re Chikka Putta*(1), *In re Matha Goundan*(2), *In re Bettay*(3), and the *dictum* in *Khoda Buksh* v. *Moti Lal Johori*(4), extending this doctrine to the recovery of the money has my fullest concurrence.

It was pressed upon us by learned counsel for the applicants for revision that the extension of the Act by a notification under section 5 does not extend the place of residence of the complainant, which is fixed by the Statute within the Presidency towns, and the limits of a Presidency town cannot be extended by extending the Act. But it appears that this Act has, as a matter of fact, been working in Bombay, Madras, Assam and elsewhere throughout the districts for many years without objection, and however sound this technical objection may be, as a question of drafting, it is too late to raise it now. The doctrine of *factum valet* appears to apply, and the ordinary rules for the interpretation of Statutes also seem to favour the contention that the extension of the Act extends all its incidents; even though in terms the extension of the residence of the complainants is impossible.

But for the reasons I have already given I am of opinion that these Rules should be made absolute, and further proceedings dropped.

Rule absolute.

E. H. M.

(1) (1884) 1 Weir. 704.
(2) (1884) 1 Weir. 705.
(3) (1884) 1 Weir. 706.
(4) (1906) 11 C. W. N. 247.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Doss.

TRAILOKYA NATH RAY CHAUDHURI
v.
JOGENDRA NATH RAY.*

1908
March 9.

Mesne profits—Amount to which plaintiff is entitled—Decree—Civil Procedure Code (Act XIV of 1882), s. 211.

A successful plaintiff in a suit for possession and mesne-profits is not entitled to claim mesne-profits accrued after the institution of the suit for more than three years from the date of the decree, if that event occurred before the actual delivery of possession.

Bhup Indar Bahadur Singh v. *Bijai Bahadur Singh*(1), *Uttamram* v. *Kishordas*(2) and *Narayan Govind Manik* v. *Sono Sadashiv*(3) followed in principle.

APPEAL from Order by the judgment-debtors.

The appeal arises out of a proceeding for assessment of *wasilat*.

A commission was issued for this purpose and the Commissioner, after an *ex-parte* enquiry, the judgment-debtors having adduced no evidence, submitted his report. Before the Subordinate Judge, the judgment-debtors contended that the decree did not award *wasilat* to the decree-holder, and therefore no *wasilat* could be recovered in execution. The decree was very badly drawn up. It directed possession to be given to the plaintiffs, and then it went on to say that the amount of *wasilat* due to the plaintiffs was to be assessed in execution without providing in so many words that the plaintiffs were to get *wasilat* from the defendants.

The judgment-debtors further contended that the decree-holders could not certainly recover *wasilat* from the date of the

* Appeal from Order No. 523 of 1906, against the order of Pran Krishna Biswas, Subordinate Judge of Faridpur, dated the 7th of September 1906.

(1) (1900) I. L. R. 23 All. 152; L. R. 27 I. A. 209.

(2) (1899) I. L. R. 24 Bom. 149.

(3) (1899) I. L. R. 24 Bom. 345.

1908

NARWANJI PRASAD SINGH v. LACHMAN HAJAM.

on the ground of the *illegality* of the order of imprisonment, on the authority of *Sew Balak Raut* v. *Banwari Singh**.

**Before Mr. Justice Pargiter and Mr. Justice Woodroffe.*

SEW BALAK RAUT

v.

BANWARI SINGH.*

1905

July 8.

Babu Jatindra Mohun Sen Gupta for the petitioners.

PARGITER J. This Rule was issued on the District Magistrate of the 24-Pergunnahs to show cause why the sentence passed on this applicant under section 2 of Act XIII of 1859 should not be set aside on the ground that it was not passed in conformity with law, or why such further order should not be passed as to this Court may seem fit.

The case is one in which the applicant was ordered to repay a certain sum of money, which had been advanced to him by the complainant, and the Sub-divisional Magistrate of Barrackpore, at the same time that he passed the order directing the applicant to refund the money, also ordered that he should be sentenced to rigorous imprisonment for two months in default. The section clearly implies that, after the order is passed for repayment under the first part of the section, an interval should occur in order to see whether he should comply with it or not. The Magistrate, without giving him such opportunity, has imposed the sentence, that is, he has imposed punishment for an offence, which had not been committed at the time when he passed the order. That was clearly wrong. It was so held in *Srinivasa Mudali* v. *Ponnambalam*(1).

Accordingly we set aside the order sentencing the applicant to imprisonment, and make the Rule absolute.

This order governs also Criminal Revision No. 506.

WOODROFFE J. I agree that these Rules should be made absolute. But I wish to add that the case in *Ateram Das Mochi* v. *Abdul Rahim*(2), referred to in the Explanation, merely holds that the proceeding under the first clause of section 2 of Act XIII of 1859 is not a criminal proceeding. In the present case an order was passed under the second clause of section 2 concurrently with an order under the first portion of that section. The order, which was passed, awarded a term of imprisonment. In this connection we have been referred to a decision in *Queen-Empress* v. *Ashwini Kumar Ghose*(3) and to section 4, clause (o) of the Criminal Procedure Code under which an offence means any act made punishable by law. That being so the order before us is one, which it is within our jurisdiction to deal with.

Rule absolute.

* Criminal Revision No. 505.

(1) (1882) I. L. R. 5 Mad 376. (2) (1899) I. L. R. 27 Calc. 131.

(3) (1896) I. L. R. 23 Calc. 421.

The only point then is, whether the plaintiffs can claim mesne-profits accrued after the institution of the suit for more than three years from the date of the decree.

The point is not free from authority. But before dealing with the authorities, it will be convenient to turn to section 211 of the Code of Civil Procedure, on which the question really hinges.

Section 211 runs as follows:—"When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne-profits in respect of such property from the institution of the suit until the delivery of possession to the party, in whose favour the decree is made, or until the expiration of three years from the date of the decree, *whichever event first occurs.*"

So far as I am aware, this is the only section in the Code, which enables the Court to allow mesne-profits from the date of the institution of the suit up to the time of the delivery of possession. In the present case possession was not given until the 16th of June 1906. The decree of this Court was, as I have said, dated the 25th of July 1898. The appellants contend that, having regard to the language of section 211, the plaintiffs can recover mesne-profits only for three years from the latter date; whilst the respondents claim that they are entitled to the profits up to the 16th of June 1906, which makes a difference of mesne-profits for about five years. The language of the section appears to me to be clear. It says "until the delivery of possession to the party, in whose favour the decree is made, or until the expiration of three years from the date of the decree, *whichever event first occurs.*" Now, which event did first occur? The event, which first occurred, was the expiration of three years from the date of the decree, the 25th July 1898 We must give effect to the clear language of the legislature. How do the authorities stand? The view I have expressed above gains support from the head-note to the case in the Judicial Committee in *Lhup Indar Bahadur Singh* v. *Bijai Bahadur Singh*(1), where it is said, "it was held that mesne-profits were recoverable up to May 11th,

(1) (1900) I. L. R. 23 All 152; L. R. 27 I. A. 209.

1908

NARWANJI PRASAD SINGH v. LACHMAN HAJAM.

HOLMWOOD J.

I must say I agree with all that the learned District Magistrate has written. It is immaterial now, as the order has in any case to be set aside as illegal, but it might have, and to my mind has, in revision a very strong bearing on the propriety of carrying the connected proceedings further.

Rule absolute.

E. H. M.

APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Bell.

MUKH LAL SINGH

v.

JAGDEO TEWARI.*

1908
May 20.

Civil Procedure Code (Act XIV of 1882) s. 30—Notice, service of—Dismissal of suit.

It is the duty of the Court to cause service of the notices or advertisements to be published as required by s 30 of the Civil Procedure Code (Act XIV of 1882). If a plaintiff omits to move the Court for that purpose, his suit should not be dismissed on account of the failure of the Court to perform the duties imposed upon it by that section.

APPEAL by the plaintiffs, Mukh Lal Singh and others.

Certain inhabitants of village Basarhi in Chupra instituted a suit against some inhabitants of villages Manna and Dumaria for a declaration of their right to the use of the water of a *jhil*. All the persons interested in the disputed right were not parties to the suit.

Permission of the Court as required by s. 30 of the Civil Procedure Code was applied for in the plaint, but not obtained, nor were notices of the institution of the suit served personally or by public advertisement on all the parties interested, though their names were mentioned in the written statement. The plaintiffs had not moved the Court for that purpose. This point was not considered by the learned Munsif, who decreed the plaintiff's suit. On appeal the District Judge of Saran held that the failure to serve notices on the persons interested in the dispute was fatal to the plaintiff's case and, reversing the decree of the learned Munsif, dismissed the plaintiff's suit with costs.

The plaintiffs appealed to the High Court.

* Appeal from Appellate Decree No. 4100 of 1907 against the decree of A. Mellor, District Judge of Saran, dated the 1st December 1906, reversing the decree of Ali Ahmed, Munsiff of Chupra, dated the 19th June 1906.

1908

ATAR SINGH
v.
THAKAR SINGH.

April 1879 Rajind Kaur, one of the widows, made a gift of certain other properties to her daughter Khem Kaur, and on 15th October 1891, Rajind Kaur made a gift of the properties in suit to Gurdit Singh, the son of Khem Kaur.

Dyal Singh, who was the next reversioner to Dhanna Singh's estate on the death of Rajind Kaur, was unable from want of funds to take any action to establish his rights in connexion with the above and other alienations of Dhanna Singh's estate made by the widows: and after various unsuccessful efforts to obtain money by sharing the property with the lender, Dyal Singh, on 27th October 1891, entered into an agreement with the appellants Man Singh, Kharak Singh, and Harnam Singh, by which he was to give them " $\frac{5}{16}$ths share of each and every alienated property, for cancellation of the alienations of which a decree may be passed by the Courts concerned, in lieu of the expenses, which may be incurred by the said persons in Courts, the help, which they may give and the labour and time which they may expend in the prosecution of the case relating to the said alienation." The expenses to be paid were not to include pleader's fees, as to which Dyal Singh on the same date entered into a separate agreement with the appellant Atar Singh to give him a $\frac{3}{16}$th share in each property recovered by the exertions of the pleader in lieu of any payment for his services.

In pursuance of the agreements a suit was at once brought against Gurdit Singh, and on 26th April 1895 a final decree was made by the Chief Court of the Punjab declaring that the deed of gift dated 15th October 1891 was inoperative after the death of Rajind Kaur. That lady died on 27th April 1894 and on 7th May 1894, Dyal Singh executed the deed of sale, which it was sought to set aside in the suit, out of which this appeal arose, and by which a $\frac{3}{6}\frac{1}{4}$th share in the properties in suit was conveyed to the appellants and other members of their family.

The suit was brought on 16th October 1897, on behalf of the two sons of Dyal Singh, then minors, Thakar Singh and Kehr Singh, the latter of whom died pendente lite. The plaint alleged that the sale was without legal necessity, and that the property in suit was ancestral property, and therefore not liable to alienation by Dyal Singh except for necessity, and it was prayed that

ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

KADER KHAN
v.
JUGGESWAR PRASAD SINGH.*

1908
June 16.

Civil Procedure Code (Act XIV of 1882) ss. 108, 157—Suit part-heard—Adjourned hearing—Withdrawal of defendant's Counsel—Decree—Remedy.

At an adjourned hearing of a part-heard suit, the plaintiff having closed his case, and the case of the defendant having been partially entered into, Counsel for the defendant applied for a further adjournment, which was refused, and thereupon he withdrew from the case.

In his absence, the Court passed judgment on the merits of the case.

An application to have the decree set aside as an *ex-parte* decree was dismissed on the ground that under the circumstances of the case an application under s. 108 combined with s. 157 of the Civil Procedure Code could not lie.

THIS was an application for an order to set aside a decree alleged in the petition to be an *ex-parte* decree, passed on May 1st, 1908.]

The suit was instituted on April 30th, 1907, for the recovery [from the defendant of the sum of Rs. 17,000, being the price of fourteen Australian horses including charges for stabling and breaking in.

The defendant filed his written statement on July 25th, 1907. On November 20th, 1907, he applied for the issue of a commission for the examination of ten witnesses on his behalf, including himself and one Mukhy Singh: this application, so far as it related to himself and Mukhy Singh, was rejected.

The suit came on for hearing on April 24th, 1908, and the defendant was represented by Counsel and contested the suit. The plaintiff's case continued on April 27th, 28th and 29th, on which day it closed, and the defendant entered on his defence. Evidence of several witnesses taken on commission was read on behalf of the defendant, two witnesses were examined and documentary evidence tendered. It was understood that two

* Original Civil Suit No. 314 of 1907.

1908

KADER KHAN
v.
JUGGESWAR PRASAD SINGH.

WOODROFFE J.

is that laid down in section 157. See *Maharaja of Vizianagram* v. *Lingam Krishna Bhupati*(1), *Shrimant Sagajirao* v. *Smith*(2), *Hildreth* v. *Sayaji Piraji*(3), *Denoo Paroye* v. *Chinta Monee Chowdhry*(4).

Mr. B. C. Mitter (*Mr. A. N. Chaudhuri* with him) for the plaintiff. On May 1st the suit was actually decided on the merits and disposed of under section 158 and not under section 157. Section 157 does not say the Court *must* proceed under section 102. See *Mingappa* v *Gowdappa*(5). An adjourned hearing does not become an *ex-parte* hearing, unless the matter is disposed of by the Court in the mode prescribed by Chapter VII. See *Cooke* v. *The Equitable Coal Co. Ld.*(6). Suppose the plaintiff had not appeared on that day, the suit could not have been dismissed under section 102. Where a plaintiff appears in a suit and goes into evidence, but, before the evidence is closed, makes default, and the case is dismissed, matters in issue would be *res judicata*. See *Roma Nath Das* v. *Mohesh Chunder Pal*(7). Where evidence has been given, so that the Court is in a position to deal with the suit on the merits, the matter cannot come under Chapter VII. See *Badam* v. *Mathu Singh*(8). *Raghapa Bin Hanwapa* v. *Barapa Bin Shivapa*(9) and *Mussumat Chand Koer* v. *Partab Singh*(10) were also referred to.

WOODROFFE, J. This is an application for an order that the decree, which in the petition is alleged to be an *ex-parte* decree, passed by me on the 1st May 1908, should be set aside. It purports to be made under section 108 combined with section 157 of the Civil Procedure Code. The first question, before that of the merits arises, is, whether I have power to make the order asked for under those sections. The facts, so far as they bear on this question, are these. The suit came on for hearing on the 24th April 1908. The summons was served, the defendant entered appearance to the suit and on the day for hearing appeared and contested

(1) (1902) 12 Mad. L. J 473.
(2) (1895) I. L. R. 20 Bom. 736.
(3) (1895) I. L. R. 20 Bom. 330
(4) (1872) 18 W. R. 457.
(5) (1905) 7 Bom. L. R. 261.
(6) (1907) I. L. R. 34 Calc. 235.
(7) (1903) 9 C. W. N. 673.
(8) (1902) I. L. R. 25 All. 194.
(9) (1876) I. L. R. 1 Bom. 217.
(10) (1888) L. R. 15 I. A. 156.

contested the suit throughout the hearing up to the 30th April, the decree was passed *ex-parte* on the 1st May. It appears to me that the applicant has not made out that on the facts of the suit I have power to set aside the decree, which I passed on the 1st May. No case has been cited before me, which goes the length of holding that, under the circumstances existing in this case, the decree can be set aside. It appears to me that the defendant is not without remedy. If he is not satisfied that I rightly refused the application for adjournment made to me on the 1st May his course is by way of appeal and, if the appellate Court considers any further evidence is necessary, it may direct the evidence to be taken or possibly the defendant might, if in time, apply for a review. In my opinion the defendant has not made out that he is entitled to have the decree set aside in the manner sought, and I must dismiss the application with costs. I may add that I have not gone into the merits of the application, because it was unnecessary to do so.

It should be noted that learned Counsel for th defendant offered, in the event of the decree being set aside, to deposit Rs. 20,000 in Court to meet any decree that might thereafter be made for the plaintiff's claim and costs.

Application dismissed.

Attorney for the plaintiff: *N. C. Mandal.*
Attorneys for the defendant: *Orr, Dignam & Co.*

J. C.

Process was issued against them, and their cases were fixed before Babu Nando Lal Bagchi, a Deputy Magistrate of Alipore, for the 19th May. In the meantime the petitioners obtained a Rule from the High Court to quash the proceedings upon the ground that the trying Magistrate had no jurisdiction, and in the alternative, for a transfer of the case to Patna, and the proceedings pending before Babu Nando Lal Bagchi were directed to be stayed. The Rule came on for hearing on the 10th June, when the period of the contracts had expired.

Mr. A. Chowdhury (and *Babu Tarak Chandra Chakravarti*) for Narwanji Prasad. The remedy under Act XIII of 1859 is of a civil nature. The option of getting the money, which was advanced, returned after the expiry of the contract period still exists. The case of *Khoda Buksh* v. *Moti Lal Johori* (1) seems to hold otherwise, but the opinion there expressed is *obiter*. He then dealt with the case on the facts.

Mr. Mahmoodul Huq (with *Babu Atulya Charan Bose*) for the petitioners. The effect of section 5 of Act XIII of 1859 is only to give a Magistrate beyond the limits of a Presidency town the same jurisdiction as a Police Magistrate has within such limits, but subject to the same conditions as to residence of the master or employer. The contract having now expired, the complainant cannot be said to have an *option* or choice as to which of the alternative remedies provided for in the Act he would have: see *Khoda Buksh* v. *Moti Lal Johori* (1), *In re Chikka Putta* (2), *In re Matha Goundan* (3), *In re Bettay* (4).

STEPHEN J. The petitioners are alleged to have entered into a contract at or near Patna with one Narwanji Prasad to work for him at certain brickfields in the neighbourhood of Calcutta for a period ending on the 31st of May, now passed. It is said they received an advance of money on account of the

(1) (1906) 11 C. W. N. 247.
(2) (1884) 1 Weir. 704.
(3) (1884) 1 Weir. 703.
(4) (1884) 1 Weir. 703.

attributed, to the Act, of enabling a Presidency Magistrate to enforce a contract made and to be performed anywhere in British India, no doubt lends some colour to the suggestion that the extension of the Act has no effect except to provide for its enforcement at or near the place where it was made, or it is to be performed. But had this been the intention of the Legislature, I do not think they would have mentioned the extension of the Act. Also I consider that the language of section 5 shows that the extension of the Act means the extension of the whole Act, that such extension is something more than merely conferring certain powers on the officers mentioned, and that giving them those powers is merely ancillary to something else. If this is so, the only other effect that the extension can produce is to confer on persons residing and carrying on business in the area, to which the Act is extended, the privilege conferred by the Act on persons similarly situated in regard to the Presidency towns.

That a practice has been followed for nearly fifty years is no proof that it is legal. But when we find that the Act has been extended to all the Collectorates in the Bombay Presidency, to all the districts of Madras, to the town and cantonment of Rangoon, and to the tea districts of Assam and Darjeeling, it is impossible to suppose that the privileges it confers were not intended to be exercised, and were not in fact exercised by persons, who resided or carried on business in those places and did not do so in a Presidency town. And I cannot find in the numerous reports of cases that have arisen under this Act that the exercise of such a privilege has ever been challenged. Consequently I am of opinion that a master or employer residing or carrying on business in a place, to which the Act is extended, has the same rights as are conferred by the Act on masters or employers resident or carrying on business in any Presidency town; and that the first ground I have mentioned, on which we are asked to make this Rule absolute, fails.

As to the second argument in support of the Rule, apart from authority, I cannot regard it as sound. It was long ago decided in this Court that the Magistrate cannot order the workman to perform his work after the term of the contract had expired;

This is the view that was taken by this Court (Mitra J. and Holmwood J.) in the case of *Khoda Buksh* v. *Moti Lal Johori* (1), to which I was a party. The law has, it is true, been much more stringently interpreted in Madras, Bombay and Allahabad, but I prefer to follow the spirit of the rulings of this Court.

The offence created by the Act is not the neglect or refusal of the workman to perform his contract, but the failure on his part to comply with an order made by the Magistrate directing the workman to repay the money advanced or perform the contract: *King-Emperor* v. *Takasi Nukayya* (2). The complainant has the option of repudiating the contract and getting the money back or of keeping to the contract and getting the work done. Imprisonment is imposed as the punishment of refusing either of these remedies, but no fine or imprisonment is provided as a punishment after the contract has been broken and expired. The option being the return of money advanced or the performance of the contract, while it is still running, it seems to me that the Magistrate's jurisdiction is gone, if the option has become impossible. The complainant must exercise that option within the time the contract is running. He cannot come after the contract has expired and say: "Now I have no option, but I want my money back." The very fact that he has no option throws him on his ordinary civil remedy.

As regards the enforcing of the remedy, if it has been duly sought within the time before the contract has expired, I do not think any hard and fast rule can be laid down, but as to the exercise of the option I am clear, and the circumstances of this case fully bear me out.

In the case that has been tried out, and which forms the subject of another Rule, the option chosen by the complainant was that the work should be completed, but now that the time has expired in the other cases, the complainant merely wants his money back, or rather wants to punish the accused with imprisonment for failing to return the money. The Magistrate of the District, in showing cause for the Crown, considers that the case is a more than doubtful one, and recommends the quashing

(1) (1906) 11 C. W. N. 247. (2) (1901) I. L. R. 24 Mad. 660.

CRIMINAL REFERENCE.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

NARWANJI PRASAD SINGH
v.
LACHMAN HAJAM.*

Act XIII of 1859, ss. 2 and 3—Contract—Imprisonment—Legality of simultaneous orders to perform the work contracted for and to suffer imprisonment in default.

An order of imprisonment in default, passed simultaneously with an order to perform work according to the terms of the contract under Act XIII of 1859, is illegal.

ONE Narwanji Prasad Singh, a brick contractor, carrying on business at Shahpur in the 24-Parganas, filed a complaint against the accused, Lachman Hajam, on the 5th March last, stating that he had advanced various sums of money to such person, between the 8th December 1907 and 24th February 1908, for work to be performed, from January 1908 till the 1st June, on his Shahpur brick-fields, and that the latter had wilfully and without lawful cause refused to complete the same according to the terms of the contract.

The case was tried by a Deputy Magistrate of Alipore, who passed the following order: "I direct him, therefore, under s. 2 of Act XIII of 1859, to perform the work contracted for and to join the work by the 11th May next. If he fails to do it, he will suffer rigorous imprisonment for three months."

The officiating District Magistrate of Alipore referred the case to the High Court under s. 438 of the Criminal Procedure Code, recommending the reversal of the order, both on the facts and

* Criminal Reference No. 96 of 1908, by L. Kirley, Officiating District Magistrate of Alipore, dated the 16th May, 1908.

Mr. A. Chowdhry (*Babu Tarak Chandra Chakravarti* with him), for Narwanji Prasad Singh, dealt mainly with the facts of the case.

Mr. Mahmoodul Huq (*Babu Atulya Charan Bose* with him) for the opposite party. The order of imprisonment in default of non-compliance with the order to perform the work contracted for is illegal.

STEPHEN J. The complainant in the case that I have just dealt with obtained an order in his favour from the Deputy Magistrate as regards one of the workmen, whom he says he contracted with. By that order the workman was ordered to perform the work contracted for under the sanction of imprisonment for a term, which exceeds the term of the contract. This order is referred to us by the District Magistrate under section 438 of the Criminal Procedure Code on the ground that it is illegal in respect of the term of the imprisonment that is imposed according to the ruling of this Court mentioned in the letter of Reference. This is so, and the order must be set aside accordingly. The District Magistrate also is of opinion that the decision is against the weight of evidence. This seems to me more doubtful, as it seems that the person complained against probably came to Shahpur to work for the complainant, which leads me to suppose that the story of the advance is more likely to be true than the District Magistrate thinks In the view of the point of law, however, it is unnecessary to decide this point.

HOLMWOOD J. The District Magistrate in referring the conviction of Lachman Hajam to us for reversal has drawn our attention to the illegality of the Magistrate's order, on which alone I agree it must be set aside, but he has also referred the matter to us on the ground that the Deputy Magistrate has decided in favour of the contract against the weight of evidence, and, under the special circumstances of the case, has occasioned a serious miscarriage of justice

PRIVY COUNCIL.

ATAR SINGH
v.
THAKAR SINGH.

P. C.*
1908
June 17.
July 16.

[On appeal from the Chief Court of the Punjab.]

Hindu law—Alienation by father—Ancestral and self-acquired property—Onus of proof—Suit to set aside alienation as being made without legal necessity—Conjecture and positive proof.

In a suit to set aside a deed of sale of immoveable property executed by the plaintiff's father, who had succeeded to it (*inter alia*) as the next reversionary heir on the death of the widow of the last male owner, the plaintiff alleged that the land sold was ancestral property, and that the alienation had been made without legal necessity and was therefore void.

The evidence showed that the last male owner had acquired some lands in the district by purchase and others on abandonment by collateral relatives, but there was no evidence defining the boundaries of these portions respectively, that being merely a matter of conjecture.

Held, that the onus was on the plaintiff to show that the property alienated was not self-acquired in the hands of the last male owner; and that in seeking to discharge such onus he could not, under the circumstances, be assisted by conjectures, however reasonable, in place of positive proof.

APPEAL from a decree (26th May 1903) of the Chief Court of the Punjab, which reversed a decree (30th March 1899) of the Court of the District Judge of Amritsar.

The defendants were appellants to His Majesty in Council.

The main question involved in this appeal was whether and to what extent a deed of sale executed on 7th May 1894 by one Dyal Singh, the respondent's father, was or was not binding on the respondent, the plaintiff in the suit.

The property sued for consisted of land and a house situate in the village of Tungbala, and seven houses situate in the city of Amritsar, which was at one time the property of one Sardar Dhanna Singh and on his death passed to his widows. On 13th

* *Present:* Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble, and Sir Arthur Wilson.

the sale be declared not binding on the reversionary interests of the plaintiffs.

Dyal Singh, who was made a defendant, alleged that he had received no consideration for the deed and had executed it under the influence of liquor. The vendee defendants pleaded that the property was not ancestral, that Dyal Singh had full power of alienation, that the alienation was for necessity, and that the plaintiff Thakar Singh, having been born after 27th October 1891, had no locus standi to challenge the sale.

Issues were raised, of which the only one now material was, whether the property in suit was ancestral or self acquired. Both Courts in India found that Thakar Singh was born on 7th March 1893; and that the houses in Amritsar were not ancestral; and the only dispute on appeal was as to the land and house in the village of Tungbala.

As to this the District Judge held that the property in dispute situated in Tungbala was not ancestral estate; and on that ground made a decree dismissing the suit. He concluded his finding as to the property not being ancestral as follows:—

"In the absence of reliable evidence, or reliable evidence showing clearly what was the area of the original Tungbala, how much of this was taken up in the Rakh Shikargarh, and how much joined on to the City of Amritsar, which became nazul or Crown lands, and how much was restored back by the Sikh Raj to the Sardar, and whether this was out of Tung lands, or out of other lands included in the Rakh, or partly out of both, it appears to me to be absolutely hopeless to be able to decide that the true character of the land is ancestral so far as plaintiff, Thakar Singh, is concerned

"A very difficult task was laid on plaintiff to perform, viz., to prove positively that the land in suit was ancestral. The plaintiff had conjectures to help him, as I have already described, and very reasonable conjectures, too—but after all, only conjectures—whereas absolute certainty was demanded. The nature of the Sardar's rights in the village was decidedly peculiar, prima facie, they were acquired rights, that is, by self acquisition, for all individual rights were lost by the confiscation by the Sikh Raj, and had it not been for the Sardar, the lands then taken would have still formed part of Rakh Shikargah, as the other lands of other villages then included. Under these circumstances I have come to the conclusion that plaintiff has failed to establish affirmatively that the land in suit is ancestral. I have come to this conclusion the more readily, as the Sardar had 1,197 ghumaos of land, and all the land has been sold by his widows, so that what the Sardar got from the common ancestor, Ghaur Singh, and from his collaterals, may well be regarded as included in that sold by the widows, and that the land now in dispute is self-acquired. It is said, with some show of reason, that the original land of